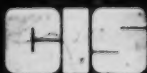


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NOMINATION OF ROBERT H. BORK TO BE
AN ASSOCIATE JUSTICE OF THE UNITED
STATES SUPREME COURT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL
VIEWS



OCTOBER 13, 1987.—Ordered to be printed

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INTRODUCTION

"We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Our nation has flourished for 200 years under the Constitution and the tradition of individual liberty in which it was conceived. When throughout our history that tradition has been challenged, the Constitution and the ideals it embodies have emerged victorious. The nation has grown stronger with each victory.

The Supreme Court has served as the last bulwark of protection for our rights when the government has unduly intruded into the realm of individual liberty. So it was for our parents and grandparents; and in our complex and often intrusive modern society, the Court must be ever more vigilant to protect the liberty of our children and grandchildren.

For that task, we need Supreme Court justices who understand that "the spirit and grandeur of the Constitution lies in its magnificent abstractions and its deliberate ambiguities," and who are prepared for the profound work of applying that document to the "untidiness of the human condition." (Testimony of Judge Shirley Hufstедler, Comm. Print Draft, Vol. 2, at 921, 923.) We need justices who understand and accept that

"[j]ustice," "liberty," "welfare," "tranquility," "due process," "property," "just compensation" are neither neutral nor static concepts or principles. They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content and carry any meaning. None can be cabined without destroying the soul of the Constitution and its capacity to encompass changes in time, place, and circumstances. (Comm. Print Draft, Vol. 2, at 923.)

The committee has concluded that the judicial philosophy and approach that Robert H. Bork would bring to the Court are inadequate for these great responsibilities. His jurisprudence fails to incorporate the ennobling concepts of the Constitution. It is thus fundamentally at odds with the express understanding of the Framers and with the history of the Supreme Court in building our tradition of constitutionalism. By depriving the Constitution of its spirit, that philosophy threatens the vitality of our tradition. Above all, our nation demands that the Supreme Court exercise wisdom and

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statesmanship in mediating conflicts spurred by growth and change in a dynamic society.

This report canvasses the record of significant issues that were developed at the committee hearings. All Senators subscribing to this report concur that each of these issues was relevant to some members of the committee in reaching the recommendation that the Senate not consent to this nomination. But, individual Senators may not agree with the conclusions drawn in every section.

NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE
JUSTICE OF THE UNITED STATES SUPREME COURT

OCTOBER 13, 1987.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

The Committee on the Judiciary, to which was referred the nomination of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court, having considered the same reports unfavorably thereon, a quorum being present, by a vote of nine yeas and five nays, with the recommendation that the nomination be rejected.

PART ONE: BACKGROUND AND QUALIFICATIONS

I. BACKGROUND

The committee received the President's nomination of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court on July 7, 1987. The hearings on Judge Bork's nomination were held on September 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, and 30. The nominee completed 30 hours of testimony, extending over four-and-a-half days, before the committee. The 12 days of hearings lasted approximately 87 hours, and during that time the committee heard from 112 witnesses.

The testimony of public witnesses was organized so as to encourage as full and complete a discussion as possible of the various subjects relevant to this nomination. An effort was made to bring before the committee some of this nation's most eminent legal scholars and most distinguished lawyers and public servants to testify both in favor of and against the nominee. Where appropriate, witnesses testified in panels organized by subject matter, facilitating thorough questioning and debate of each issue. The committee was particularly privileged to receive testimony from President Gerald Ford, former Chief Justice Warren Burger and five former Attorneys General of the United States. Set forth as Appendix I to this Report is a complete witness list for these hearings, organized by date of appearance and briefly indicating biographical data where appropriate.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, his five-year record as a Judge on the United States Court of Appeals for the District of Columbia Circuit, and his extensive written and spoken record. On October 6, a quorum being present, the committee took two roll call votes. The first vote was on a motion to report the nomination with a favorable recommendation. The committee voted, 9 to 5 against that motion:

NAYS

Mr. Biden
Mr. Kennedy
Mr. Byrd
Mr. Metzenbaum
Mr. DeConcini
Mr. Leahy
Mr. Heflin
Mr. Simon
Mr. Specter

AYES

Mr. Thurmond
Mr. Hatch
Mr. Simpson
Mr. Grassley
Mr. Humphrey

The second roll call vote was on a motion to report the nomination with a negative recommendation. The committee voted, 9 to 5, in favor of the motion:

AYES

Mr. Biden
Mr. Kennedy
Mr. Byrd
Mr. Metzenbaum
Mr. DeConcini
Mr. Leahy
Mr. Heflin
Mr. Simon
Mr. Simpson

NAYS

Mr. Thurmond
Mr. Hatch
Mr. Simpson
Mr. Grassley
Mr. Humphrey

II. THE NOMINEE

Judge Bork was born on March 1, 1927, in Pittsburgh. He attended the University of Pittsburgh for a short time and then enlisted in the United States Marine Corps in 1945. He served until 1946, when he was honorably discharged. Following military service, he attended the University of Chicago, where he received a Bachelor of Arts degree. During his first year at the University of Chicago Law School, Judge Bork enlisted in the Marine Corps Reserves. He was called back to duty in 1950 and served in active military duty until 1952. He received his law degree from the University of Chicago Law School in 1953. From 1953-1954, he was a research associate with the University of Chicago Law School's Law and Economics Project.

From 1954-1962, the nominee engaged in the private practice of law. He practiced first with the New York firm of Wilkie, Owen, Farr, Gallagher & Watson and then later was an associate and partner at the Chicago firm of Kirkland, Ellis, Hodson, Chaffetz & Masters.

From 1962-1973, the nominee was a member of the faculty of the Yale Law School. He was an associate professor from 1962-1965 and a full professor from 1965-1973.

From 1973-1977, Judge Bork served as Solicitor General of the United States. In this capacity, he argued a number of cases before the Supreme Court. Judge Bork briefly served as Acting Attorney General from 1973-1974.

In 1977, Judge Bork returned to the faculty of the Yale Law School. He served as the Chancellor Kent Professor of Law from 1977-1979 and as the Alexander Bickel Professor of Public Law from 1979-1981. His book, *The Antitrust Paradox: A Policy At War With Itself*, was published in 1978.

In 1981, Judge Bork returned to private practice as a partner in Kirkland & Ellis, working out of the Washington office.

From 1982 to the present, Judge Bork has served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

III. THE AMERICAN BAR ASSOCIATION'S EVALUATION

For the first time since the American Bar Association's (ABA) Standing Committee on Federal Judiciary began evaluating Su-

preme Court nominees, a substantial minority of the Standing Committee found a Supreme Court nominee to be "not qualified" to serve on the nation's highest court. In evaluating the nomination of Judge Bork, Harold R. Tyler, Jr., Chairman of the Standing Committee (and a former federal district court judge), testified that "ten members voted well-qualified; one, not opposed, and four, not qualified." (Comm. Print Draft, Vol. 1, at 902.)

Prior to the Bork nomination, the only time that the ABA Standing Committee did not initially return a unanimously well-qualified evaluation was in 1971, when Chief Justice Rehnquist was first appointed to the Court. In that case, while the Standing Committee was unanimously of the view that Chief Justice Rehnquist was "qualified" for the appointment, three members found that his qualifications did not establish his eligibility for the committee's highest rating and, therefore, said that they were "not opposed" to his confirmation.

When Judge Clement F. Haynsworth, Jr. was nominated to the Court in 1969, the Standing Committee's initial unanimous evaluation was that he was "qualified professionally;" this was later changed to an 8 to 4 vote after evidence came to light of an alleged financial conflict of interest. Even Judge G. Harrold Carswell (nominated in 1970), whose professional competence was an issue before the Senate, received unanimous approval by the ABA. The nominations of Judge Haynsworth and Judge Carswell were rejected by the Senate.

No Supreme Court nominee who has received even a single "Not Qualified" vote from the Standing Committee has ever been confirmed by the Senate.

A. The ABA Standing Committee Uses Three Categories to Rate Supreme Court Nominees

The Standing Committee now uses three categories to describe its evaluations of Supreme Court nominees. "Well qualified" is reserved for those nominees who "meet the highest standards of professional competence, judicial temperament and integrity. . . . The persons in this category must be among the best available for appointment to the Supreme Court." "Not opposed" is the second category, applying to persons who, while "minimally qualified," are not among the best available for appointment and are not endorsed by the committee. The third category is "not qualified"—those who are not qualified "with respect to professional qualifications" for appointment to the Supreme Court. This rating system is somewhat different from that used for federal district court and appellate court judgeships.

The Standing Committee rates candidates on the basis of a limited set of criteria. As stated in a September 21 letter from Judge Tyler to Chairman Biden: "The Committee's evaluation of Judge Bork is based upon its investigation of his professional competence, judicial temperament and integrity. Consistent with its longstanding tradition, the Committee's investigation did not cover Judge Bork's political or ideological philosophy except to the extent that such matters might bear on judicial temperament or integrity." (Comm. Print Draft, Vol. 1, at 954.) The handbook of the ABA

Standing Committee directs its members, when investigating temperament, to consider the prospective nominee's "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors."

In a September 4 letter to Senator Metzenbaum, Judge Tyler advised that because of the limited scope of the Standing Committee's evaluation, "this committee should not specifically recommend to the Senate how it should vote on confirmation of a given nominee," and that although some might construe a "well qualified" rating as "equivalent to a firm recommendation to the Senate," such a construction "would not be justified." (Comm. Print Draft, Vol. 1, at 970.)

B. The ABA Conducted an Extensive Investigation of Judge Bork

The 15 members of the ABA Standing Committee conducted an extensive investigation of Judge Bork, including interviews with five members of the Supreme Court, with many of his colleagues on the D.C. Circuit Court of Appeals, and with approximately 170 other federal and state court judges, including female and minority members of the bench, throughout the United States. The ABA Committee also interviewed approximately 150 practicing attorneys, 79 law school deans and professors, 11 of Judge Bork's former law clerks and a number of present or former lawyers who served under Judge Bork in the office of the Solicitor General when he headed that office.

Judge Bork's opinions were examined by the dean and 10 professors at the University of Michigan Law School. The Standing Committee reviewed and considered written submissions from a number of institutions and groups, including the White House, the Lawyers Committee for Civil Rights Under Law, the past chairmen of the Antitrust Section of the ABA, the NAACP Legal Defense and Education Fund, Inc., the American Civil Liberties Union, the National Women's Law Center, Public Citizen Litigation Group and People for the American Way.

Finally, Judge Bork was personally interviewed on two separate occasions, for a total of about six hours, by three members of the ABA Standing Committee. A second interview was unprecedented for a Supreme Court nominee, but was considered necessary because of "some additional questions" that arose from discussion among members of the ABA Committee and submissions of various groups. (Comm. Print Draft, Vol. 1, at 903.)

C. The ABA Committee Was Split in Its Evaluation of Judge Bork

Based on the criteria identified above, a majority of the ABA Committee concluded that Judge Bork is "well qualified" for appointment to the Supreme Court. Five members of the committee concluded that Judge Bork did not merit such a rating because of their concerns about his judicial temperament. Such concerns were related to Judge Bork's "compassion, open-mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment." In addition, one dissenting member also expressed

reservations about what that member termed inconsistent and possibly misleading recollections by Judge Bork of the events surrounding the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus during the Watergate episode.

The interviews of Judge Bork's colleagues, other federal and state court judges, practicing attorneys and academics revealed praise for the nominee's intellectual and professional attainments and admiration for his experience and analytical abilities. Those persons who considered Judge Bork either highly qualified or qualified praised his integrity, scholarship and professional competence. A number of those interviewed expressed concerns, however, about the nominee's judicial temperament, most often relating to doubts about his compassion, open-mindedness and sensitivity to women and minorities.

The Standing Committee also reviewed allegations made by Judge James F. Gordon, a senior federal district court judge from Kentucky, relating to preparation of the written opinion in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. in which Judge Gordon sat by designation on the D.C. Circuit. Judge Gordon had written a letter to Chairman Biden, dated August 24, 1987, which was transmitted to the ABA Standing Committee. The letter alleged that Judge Bork had wrongfully attempted to make his view of the case the majority opinion, when the other two judges on the panel disagreed with his reasoning. (*See generally* Part Three, Section VIII, *infra.*) Chairman Tyler testified that, given the circumstances, the Standing Committee had felt that this "was [not] something that should weigh for or against [Judge Bork] at all." (Comm. Print Draft, Vol. 1, at 910.)

IV. THE LEGAL COMMUNITY'S EVALUATION OF JUDGE BORK

A. The Negative Evaluation of Judge Bork by the Academic Community Is Unprecedented

The committee has received letters from approximately 2,000 members of the legal academic community in opposition to Judge Bork's confirmation. Simply put, the extent of this opposition is unprecedented. Prior to this nomination, the maximum number of law professors voicing their disapproval of a judicial nominee had been 300, in connection with the nomination of Judge Carswell.

The committee received letters signed by 1,925 law professors opposing Judge Bork's confirmation. (Comm. Print Draft, Vol. 3, at 1899.) This figure represents nearly 40 percent of the full-time law faculty at American Bar Association-accredited law schools in 47 states and the District of Columbia. (There are no ABA-accredited law schools in Alaska, Nevada and Rhode Island.) The signatories to these letters also represent faculty from 90 percent of the ABA-accredited law schools (153 schools out of a total of 172).

The committee also received a letter signed by 32 law school deans.¹ (Comm. Print Draft, Vol. 2, at 91-97.) This letter stated:

Judge Bork has developed and repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with most of the pivotal decisions protecting civil rights and liberties that the Supreme Court has rendered over the past four decades. . . . If Judge Bork were to be confirmed, his vote could prove determinative in turning the clock back to an era when constitutional rights and liberties, and the role of the judiciary in protecting them, were viewed in a much more restrictive way. (Comm. Print Draft, Vol. 2, at 92.)

Finally, the committee received a letter from 71 constitutional law professors, the text of which was identical to that signed by the law school deans. Three persons signed both this letter and the deans' letter. (Comm. Print Draft, Vol. 2, at 80-90.)

B. Opposition to Judge Bork's Confirmation Also Came from Other Professional Legal Groups

A large number of practicing lawyers and organized bar groups have also expressed their opposition to Judge Bork's confirmation. One such group is the Association of the Bar of the City of New York, through its Executive Committee, testified against the confirmation. The Association, which is one of the oldest and most prestigious bar organizations in the country and which at present has almost 17,000 members, stated that Judge Bork's "fundamental judicial philosophy . . . appears to this Association to run counter to many of the fundamental rights and liberties protected by the Constitution." (Comm. Print Draft, Vol. 2, at 845.)

The Committee also heard testimony from John Clay, representing Lawyers for the Judiciary, a Chicago-based organization with more than 700 members, which opposes Judge Bork's confirmation. The statement of Lawyers for the Judiciary concludes that "Judge Bork's philosophy . . . puts him outside the mainstream of constitutional jurisprudence and would deny what our citizens regard as their basic, fundamental rights." (Comm. Print Draft, Vol. 3, at 2212.)

¹ In a September 28 letter to the Chairman and ranking Member, James Vorenberg, Dean of the Harvard Law School, stated that while he was opposed to Judge Bork's confirmation, he did not intend to be listed as a signatory to the letter.

PART TWO: THE CONSTITUTION'S UNENUMERATED RIGHTS

I. JUDGE BORK'S VIEW OF THE CONSTITUTION DISREGARDS THIS COUNTRY'S TRADITION OF HUMAN DIGNITY, LIBERTY AND UNENUMERATED RIGHTS

The Bork hearings opened on the eve of the celebration of the 200th anniversary of our Constitution. The hearings proved to be about that Constitution, not just about a Supreme Court nominee.

The hearings reaffirmed what many understand to be a core principle upon which this nation was founded: Our Constitution recognizes inalienable rights and is not simply a grant of rights by the majority. Chairman Biden's opening statement identified these fundamental principles:

I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from the Constitution. My rights are not derived from any government. My rights are not derived from any majority. My rights are because I exist. They were given to me and each of my fellow citizens by our Creator, and they represent the essence of human dignity. (Comm. Print Draft, Vol. 1, at 68.)

This image of human dignity has been associated throughout our history with the idea that the Constitution recognizes "unenumerated rights." These are rights beyond those specifically mentioned in the Constitution itself, rights that are affirmed by the grand open-ended phrases of the document: "liberty," "due process," "equal protection of the laws" and others. The sober responsibility of preserving the meaning and content of these rights has fallen to the judiciary, and especially to the Supreme Court.

Against this understanding of the Constitution, and of human dignity, Judge Bork offers an alternative vision—that Americans have no rights against government, except those specifically enumerated in the Constitution. The contrast was stated cogently by Professor Philip Kurland:

I think it makes all the difference in the world whether you start with the notion that the people have all the liberties except those that are specifically taken away from them, or you start with the notion, as I think Judge Bork now has, that they have no liberties except those which are granted to them. (Comm. Print Draft, Vol. 3, at 1391.)

As Professor Kurland concluded: "I do not know of anything more fundamental in our Constitution" than the idea that the people have all the liberties except those specifically relinquished.

A. Judge Bork's Judicial Philosophy Does Not Recognize the Concept of Unenumerated Rights and Liberties

1. Judge Bork's Core Theory

Judge Bork has consistently described his constitutional theory as "intentionalist," meaning that he considers it the function of a judge to determine the intentions of the body that wrote the laws and to apply those intentions to the case brought before the court. Interpreting law is thus a matter of discerning the original intent of those responsible for making it.

Judge Bork reaffirmed this view in his opening statement before the committee:

The judge's authority derives entirely from the fact that he is applying the law and not his own personal values How should a judge go about finding the law? The only legitimate way is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern, whether the lawmakers are the Congress of the United States enacting a statute or those who ratified our Constitution and its various amendments. (Comm. Print Draft, Vol. 1, at 78-79.)

At the end of four and one-half days of testimony, Judge Bork confirmed that he had not altered his basic philosophy:

[T]here is much in my earlier writings—most particularly, my views on the proper role of judges and the need for faithful adherence to the text and the discernible intentions of the ratifiers of the Constitution and statutes—that I subscribe to just as fully today as I did before. . . . If the Members of the Committee are looking, as you have said you are, for predictability, it is certainly predictable that I will adhere to my judicial philosophy as I have described it in these hearings and elsewhere. (Comm. Print Draft, Vol. 1, at 721.)²

2. Judge Bork's Judicial Philosophy Leads Him to Conclude that the Constitution "Specified Certain Liberties and Allocates All Else to Democratic Processes"

The implications of Judge Bork's theory of original intent are quite clear from his writings, speeches and testimony. The most dramatic consequence of his theory is the rejection of the concept of unenumerated rights and liberties. He has consistently held to the view, both before and during the hearings, that the Constitution should not be read as recognizing an individual right unless

² Judge Bork did not always rely on original intent and the text of the Constitution for the resolution of constitutional controversies. As he wrote in 1968:

The text of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted, and ratified the great clauses. The record is incomplete, the men involved had vague or even conflicting intentions, and no one foresaw or could have foreseen, the disputes that changing social conditions and outlooks would bring before the Court. . . . ("The Supreme Court Needs a New Philosophy," *Fortune* 138, 141 (Dec. 1968).)

that right can be specifically found in a particular provision of the document.³

In particular, Judge Bork has repeatedly rejected the well-established line of Supreme Court decisions holding that the "liberty" clauses of the Fifth and Fourteenth Amendments protect against governmental invasion of a person's substantive personal liberty and privacy. He has said, for example, that:

[T]he choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. ("Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1, 8 (1971).)

Judge Bork has also disregarded the text of the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In Judge Bork's view, while there are alternative explanations for the Amendment,

if it ultimately turns out that no plausible interpretation can be given, the only recourse for a judge is to refrain from inventing meanings and ignore the provision, as was the practice until recently. ("Interpretation of the Constitution," 1984 Justice Lester W. Roth Lecture, University of So California, October 25, 1984, at 16; emphasis added.)⁴

This suggested disregard for the Amendment is consistent with Judge Bork's general recommendation about a judge's role "when his studies leave him unpersuaded that he understands the core of what the Framers intended" with respect to a particular constitutional provision:

[The judge] must treat [the provision] as nonexistent, since, in terms of expression of the framers' will, it is nonexistent. . . . When the meaning of a provision . . . is unknown, the judge has in effect nothing more than a water blot on the document before him. He cannot read it; any meaning he assigns to it is no more than judicial invention

³ In response to a question by Senator DeConcini, Judge Bork testified that he believed there were "some rights that are not enumerated but are found because of the structure of the Constitution and government." (Comm. Print Draft, Vol. 1, at 224.) These "structural" rights, which "the individual [has] for the sake of a governmental process that the Constitution outlines" ("Neutral Principles" at 17), are wholly distinct from "unenumerated rights" as that phrase is ordinarily used. These latter rights preserve individual liberties in the face of government's desire to override them, and are rights retained by the people, rather than rights given to them by the majority. It is the tradition recognizing these rights that is the subject of this Section.

⁴ Judge Bork did not always believe that the Ninth Amendment should be ignored. In 1968, he argued:

"Legitimate activism requires, first of all, a warrant for the court to move beyond the range of substantive rights that can be derived from the traditional sources of constitutional law. The case for locating this warrant in the long-ignored 9th Amendment was persuasively made by Justice Arthur Goldberg [in *Griswold v. Connecticut*, 381 U.S. 479 (1965)]. . . . This seems to mean that the Bill of Rights is an incomplete, open-ended document, and that the work of completion is, at least, in major part, a task for the Supreme Court. There is some historical evidence that this is substantially what Madison intended." ("The Supreme Court Needs a New Philosophy" at 170.)

of a constitutional prohibition; and his proper course is to ignore it. (*Id.* at 11-12; emphasis added.)⁵

According to Judge Bork, "[t]he Constitution specified certain liberties and allocates all else to democratic processes." ("Judicial Review and Democracy," *Society*, Nov./Dec. 1986 at 7; emphasis added.) Thus, under Judge Bork's view, the court interferes with the "democratic process" whenever it recognizes a right that is not specified in the Constitution. As he said in a 1985 speech and reaffirmed at the hearings, the Constitution is essentially a zero-sum system, in which rights for some necessarily come only at the expense of others:

Senator SIMON. One point, at a speech at Berkeley in 1985, you say . . . ' [When] a court adds to one person's constitutional rights it subtracts from the rights of others.' Do you believe that is always true?

Judge BORK. Yes, Senator. I think it's a matter of plain arithmetic. . . .

Senator SIMON. I have long thought it is kind of fundamental in our society, that when you expand the liberty of any of us, you expand the liberty of all of us.

Judge BORK. I think, Senator, that is not correct. (Comm. Print Draft, Vol. 1, at 289, 421; emphasis added.)

B. This Nation Was Conceived with the Recognition of Pre-existing Inalienable Rights that the Constitution Does Not Specifically Enumerate But Nonetheless Acknowledges and Protects

The founding documents of American constitutionalism—the Declaration of Independence, the Constitution and the Bill of Rights—were accepted not because they exhausted the protection of basic rights but because they expressly protected unenumerated rights as well. Indeed, the Constitution was conceived to create a national government that although sufficiently powerful to bind together diverse states, "would not threaten the individual liberty that the people retained and did not cede to any level of government." (Written statement of Professor Laurence H. Tribe, Comm. Print Draft, Vol. 2, at 18-19.)

The broad purposes of this plan are clear from the language of the founding documents. As former Congresswoman and Professor Barbara Jordan testified: "The Declaration of Independence preceded the Constitution, and the Declaration of Independence speaks of inalienable rights endowed by our Creator . . . , among them life, liberty, [and the] pursuit of happiness." (Comm. Print Draft, Vol. 1, at 787.) The Fifth Amendment states that no person shall be deprived of liberty." The Ninth Amendment mandates that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Finally, the Fourteenth Amendment—with its specific protection of "liber-

⁵ These statements cannot be squared with either Judge Bork's own framework for interpreting the Constitution or the clear statements of the Supreme Court. Indeed, they are in direct conflict with the position of the revered Chief Justice, John Marshall, who stated in *Marbury v. Madison*, 1 Cranch 137, 174 (1803): "It cannot be presumed that any clause in the Constitution is intended to be without effect."

ty"—was added with a similar purpose: To restrain the power of the states to infringe the fundamental rights of any person.

The intent to protect inalienable, unenumerated rights is clear from the history of the Bill of Rights. Originally, many opposed a Bill of Rights, fearing that the express protection of certain rights would justify an inference that rights not specifically identified were subject to governmental control. The fear that the Bill of Rights would be used in a way inimical to unenumerated rights was best expressed by James Iredell at the North Carolina ratifying convention:

A bill of rights, as I conceive, would not only be incongruous, but dangerous. No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution. Suppose, therefore, an enumeration of a great many, but an omission of some, and that long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion complained of; what would be the plausible answer of the government to such a complaint? Would they naturally say, "We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs upon their good sense, as well as their attachment to a liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them." Thus a bill of rights might operate as a snare rather than a protection. (Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. IV, at 149 (1836).)

Despite fears such as those expressed by Iredell, a number of states were very much concerned about the absence of a Bill of Rights. These states ratified the Constitution on the understanding that a Bill of Rights, including a general provision that there should be no negative inference from the express protection of certain rights that unenumerated rights are not also protected, would shortly be added to the Constitution. (Written statement of David A. J. Richards, Comm. Print Draft, Vol. 3, at 1584-85.)

The Ninth Amendment, of course, expressly rebuts the negative inference feared by many of the Founders. As Madison said when he introduced the Amendment:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the general grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Gov-

ernment, and were consequently insecure. This . . . may be guarded against. I have attempted it . . . [referring to the Ninth Amendment]. (1 Annals of Congress 439 (Gales and Seaton 1834).)

The Supreme Court has recently underscored Madison's rationale. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Court stated:

The Constitution's draftsmen . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed.

Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others. (*Id.*; emphasis added.)

Thus, the history surrounding the drafting and ratification of the Bill of Rights indicates that there had to be an express guarantee that unenumerated rights would be fully protected. The Ninth Amendment is at the core of both the Constitution and the ratification debates. The concept of unenumerated rights illustrates the depth of the tradition that the Founders meant to protect by the Ninth Amendment.

C. Judge Bork's Approach to Liberty and Unenumerated Rights Is Outside the Tradition of Supreme Court Jurisprudence

Judge Bork's approach to liberty and unenumerated rights sets him apart from every other Supreme Court Justice. Indeed, not one of the 105 past and present Justices of the Supreme Court has ever taken a view of liberty as narrow as that of Judge Bork. As Professor Tribe testified:

If [Judge Bork] is confirmed as the 106th Justice, [he] would be the first to read liberty as though it were exhausted by the rights . . . the majority expressly conceded individuals in the Bill of Rights. He would be the first to reject an evolving concept of liberty and to replace it with a fixed set of liberties protected at best from an evolving set of threats. (Tribe statement, Comm. Print Draft, Vol. 2, at 7.)

In particular, Judge Bork's philosophy is outside the mainstream of such great judicial conservatives as Justices Harlan, Frankfurter and Black, as well as such recent conservatives as Justices Stewart, Powell, O'Connor and Chief Justice Burger. Each of these members of the Court accepted and applied some concept of liberty, substantive due process and unenumerated rights.

As summarized by former Secretary of Transportation William T. Coleman, Jr.:

There can be no question that privacy and substantive individual liberty interests are clearly within the Constitution as written. Moreover, for more than half a century, the Supreme Court, by recognizing the constitutional basis for the protection of such fundamental liberties, has been able to respond in a principled fashion to the . . . prob-

lems and abuses which the framers could not have foreseen and thus cannot plausibly be said to have intended to immunize from constitutional protection. . . . Judge Bork . . . simply refuses to use the specific text "liberty" and over sixty years of Supreme Court jurisprudence or, if necessary (which it is not), the open-textured language of the Due Process Clause, to afford them constitutional protection from any intrusion in addition to mere physical restraint. (Written statement of William T. Coleman, Jr., at 21-22.) (Mr. Coleman's statement is attached as Appendix II to this report.)

1. In the 19th Century, the Supreme Court Recognized the Concept of Unenumerated Rights

From the earliest days of the Republic, "the Supreme Court has consistently and unanimously recognized that in adopting the Constitution, the people of the United States did not place the bulk of their hard-won liberty in the hands of government, save only for those rights specifically mentioned in the Bill of Rights or elsewhere in the document." (Tribe statement, Comm. Print Draft, Vol. 2, at 19; emphasis in original.)

In *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 135, 139 (1810), for example, Chief Justice Marshall barred a state's revocation of a series of land grants by relying, in part, on "general principles which are common to our free institutions." The Chief Justice noted that the "nature of society and government [may limit the] legislative power." Justice Story, in *Terret v. Taylor*, 13 U.S. (9 Cranch.) 43 (1815), struck down a state's attempt to divest a church of its property simply by declaring that the statute violated "principles of natural justice" and the "fundamental laws of every free government," as well as the "spirit and letter" of the Constitution.

The Court was even clearer in its recognition of certain fundamental rights in *Hurtado v. California*, 110 U.S. 516 (1884). It rejected the view that the Fourteenth Amendment—commanding that "[n]o State shall deprive any person of life, liberty, or property, without due process of law"—addressed only the fairness of legal procedures. The Court stated that the concept of limited government underlying the Constitution "guarantee[s] not particular forms of procedure, but the very substance of individual rights to life, liberty and property," protecting "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ." (*Id.* at 532, 535.)

2. The Justices of This Century, Including the Leading Conservative Justices, Have Recognized Unenumerated Rights

a. Justices Frankfurter and Harlan

Some witnesses have supported Judge Bork on the ground that his expressions of "judicial restraint" put him in the tradition of Felix Frankfurter and John Marshall Harlan. As stated by Secretary Coleman, former law clerk to Justice Frankfurter, "[i]n light of [Judge Bork's] views on substantive liberty and privacy, it is

clear that this characterization is 100% wrong." (Coleman statement at 20-21.)

Justice Frankfurter summarized his views on the liberty clause of the Fourteenth Amendment in *Rochin v. California*, 342 U.S. 165, 169 (1952):

These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

In Justice Frankfurter's view, the due process clause "expresses a demand for civilized standards . . . [which] neither contain the peculiarities of the first eight amendments nor are . . . confined to them." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring). The clause, he said, possessed "independent potency." *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring). And with respect to decisions applying the guarantees of the First Amendment to the states, Justice Frankfurter said they were based on the

reasoning that the Fourteenth [Amendment] prevents state intrusion upon "fundamental personal rights and liberties," that among those rights and liberties are free speech, press, etc., which the First Amendment explicitly protects against federal encroachment, and that, because they are fundamental (not because they are contained in the First Amendment), they fall within the scope of the prohibitions of the Fourteenth [Amendment]. (F. Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights Into The Due Process Clause of the Fourteenth Amendment," 78 *Harv. L. Rev.* 746, 749 (1965).)

Like Justice Frankfurter, Justice Harlan argued for a conception of the due process clause that was flexible and was independent of, but drawing support from, the Bill of Rights. The clearest and most expansive expositions of Justice Harlan's views on liberty and due process are found in *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting), and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Harlan, J., concurring in the judgment).

In *Poe*, Justice Harlan disagreed with the dismissal on procedural grounds of a challenge to Connecticut's ban on the use of contraceptives. He argued that the law should be struck down as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." (367 U.S. at 539.) Justice Harlan then set forth his view of the appropriate constitutional framework:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our

Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. **That tradition is a living thing.** A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. (367 U.S. at 542 (Harlan, J., dissenting); emphasis added.)

Justice Harlan concluded:

[Our] "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion, the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial and arbitrary impositions and restraints. . . . (Id. at 543.)

In *Griswold*, the Court struck down the Connecticut law. Justice Harlan stated that the proper constitutional analysis required an examination of whether the law "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violated basic values 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325." (*Griswold*, 381 U.S. at 500.)

Justice Harlan consistently advanced his view of "liberty" and "due process" articulated in his dissenting opinion in *Poe*. Dissenting in *Duncan v. Louisiana*, 391 U.S. 145 (1968), for example, he stated that "the very breadth and generality of the [Fourteenth] Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of 'liberty' and 'due process of law' but that the increasing experience and evolving conscience of the American people would add new 'intermediate premises.'" (*Id.* at 175; (Harlan, J., dissenting).) To restrict due process to "rules fixed in the past[t] . . . 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'" (*Id.* at 176-77; footnote omitted.)

b. Justice Brandeis

Justice Brandeis expressed his conception of liberty in slightly different, albeit no less eloquent, terms. In a dissent now recognized as expressing the Court's majority view, he said:

The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the

pain, pleasure and satisfactions of life are to be bound in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, **the right to be let alone**—the most comprehensive of rights and the right most valued by civilized man. (*Olmstead v. United States*, 277 U.S. 438, 478 (1928); emphasis added.)

c. Justice Black

While Justice Black's views on "liberty" were far different from those of Justice Frankfurter and Justice Harlan, they were still more expansive than those espoused by Judge Bork.

In *Loving v. Virginia*, 388 U.S. 1 (1967), for example, Justice Black joined the opinion of the Court striking down a state law prohibiting interracial marriage. The Court held not only that the law violated the Equal Protection Clause, but also that it deprived the petitioners of "liberty" within the meaning of the Due Process Clause. The Court said: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Id.* at 12.)

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), Justice Black joined the opinion of the Court holding that segregation by law in District of Columbia public schools deprived children of their "liberty" under the Fifth Amendment. The Court reasoned that the term "liberty" cannot be "confined to mere freedom from bodily restraint" but "extends to the full range of conduct which the individual is free to pursue" (*Id.* at 499-500.)

Justice Black also joined the Court's opinion in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which held that a law permitting the sterilization of habitual criminals violated the Equal Protection Clause of the Fourteenth Amendment. Central to the Court's analysis was the decision to subject the law to strict scrutiny because it affected "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence of the human race." (*Id.* at 541.)

Professor Walter Dellinger, former law clerk to Justice Black, testified that Judge Bork "does . . . [not] accept the enthusiastic approach of Justice Black, which fills in the liberty clause by a complete and total incorporation of the Bill of Rights." (Comm. Print Draft, Vol. 2, at 732.) And as summarized by Professor Stephen Schulhofer, who also clerked for Justice Black, in a letter to the committee:

Justice Black often joined opinions that recognized fundamental liberties not explicitly enumerated. . . . [E]ven the restrictive theory that Justice Black sometimes espoused is far different from Judge Bork's position, because of the broader context of constitutional doctrine to which Justice Black passionately subscribed. (Comm. Print Draft, Vol. 3, at 2350.)

d. Justice Stewart

Justice Stewart also agreed that "liberty" in the Constitution has substantive content. Although he dissented in *Griswold*, his concur-

ring opinion in *Roe v. Wade*, 410 U.S. 113 (1973), clearly accepted the long line of substantive due process decisions:

Griswold stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such. . . . The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. (*Id.* at 168.)

e. Justice Powell

Justice Powell has echoed the same themes as Justices Frankfurter and Harlan. He wrote in *Moore v. East Cleveland*, 431 U.S. 494 (1977), for example, that fundamental liberties were those that are "deeply rooted in this Nation's history and tradition." The right of privacy, he said, must be elaborated through "careful 'respect for the teaching of history [and] solid recognition of the basic values that underlie our society.'" (*Id.* at 503.)

Summarizing Justice Powell's opinion in *Moore*, Professor Delinger testified:

As Justice Powell said in *Moore* . . . , this court has long recognized that freedom of choice and marriage and family life is one of the liberties protected by the Fourteenth Amendment. With that sweeping text, with that as history, how can one decline to exercise the responsibility that is given, a responsibility which as Justice Powell says must be exercised with caution and restraint, but exercised nonetheless if the guarantees of the Fourteenth Amendment are not to become an empty set. (Comm. Print Draft, Vol. 2, at 725.)

f. Chief Justice Burger

Chief Justice Burger, while testifying in support of Judge Bork's confirmation, differs sharply from the nominee on the question of recognition of unenumerated rights. Writing for the Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), in which the Court held that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments, he stated:

[A]rguments such as the state makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and privacy . . . appear nowhere in the Constitution or the Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection with explicit guarantees. The concerns expressed by Madison have thus been resolved; fundamental rights, even though not expressly guaranteed,

have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined. (*Id.* at 580-81; emphasis added.)

It is not only in his *Richmond Newspapers* opinion that Chief Justice Burger differs from Judge Bork on the question of unenumerated rights; the difference is also apparent from the Chief Justice's testimony. When asked about his defense of unenumerated rights in *Richmond Newspapers*, the Chief Justice said he "would be astonished if Judge Bork would not subscribe to it." (Comm. Print Draft, Vol. 2, at 699.) As discussed above, Judge Bork clearly does not subscribe to a theory of unenumerated rights as articulated by Chief Justice Burger in *Richmond Newspapers*.

g. Judge Bork's Views Stand Apart from Those of Other Justices

Across the range of cases that Judge Bork has criticized, some of the Justices identified above have dissented from individual decisions. None comes close, however, to sharing the nominee's judicial philosophy. As Senator Kennedy remarked at the hearing: "[W]hat we are basically talking about is just not one particular area of decisions, but we are talking about a[n] [ac]cumulation." (Comm. Print Draft, Vol. 1, at 782.)

When those cumulative views are considered, Judge Bork stands apart. As Professor Wechsler, who is sometimes referred to as sharing Judge Bork's views, has remarked: "In all the things Judge Bork has written, I've never seen any recognition on his part that the open-ended language of the 14th Amendment was not simply a way of describing the admission of Negroes to the polity but was understood to be a broad reference to freedoms. I think that it means it is legitimate for judges, within this realm of duty, to articulate untouchable areas of autonomy or freedom." (Lewis, "Bork on Liberty," *New York Times*, September 6, 1987.)

Every one of the Justices reviewed above has recognized the concept of fundamental rights and liberties—a concept Judge Bork steadfastly refuses to accept. (See Testimony of Paul Gewirtz, Comm. Print Draft, Vol. 2, at 1246; Tribe testimony, Comm. Print Draft, Vol. 2, at 55.)

3. Each Member of the Current Court Accepts the Notion of Fundamental Rights

As revealed by *Turner v. Safley*, 107 S. Ct. 2254 (1987), in which the Court unanimously struck down a ban on marriage by prison inmates, every current Justice accepts the view that the substantive "liberty" in the Constitution encompasses at least some fundamental personal matters. Justice O'Connor, in an opinion joined by every Justice (including Chief Justice Rehnquist and Justice Scalia), noted "that the decision to marry is a fundamental right" even for prisoners. (107 S. Ct. at 2265, citing *Zablocki v. Redhail*, 434 U.S. 374 (1976) and *Loving v. Virginia*, 388 U.S. 1 (1967).)

4. Prominent Constitutional Scholars Who Have Often Held Widely Different Views Reject Judge Bork's Philosophy of the Constitution

Two prominent constitutional scholars who otherwise often hold widely different constitutional views are Philip Kurland and Laurence Tribe. On the issue before the committee, however, both are in agreement. Both Professor Kurland and Professor Tribe testified against Judge Bork's confirmation, relying on an assessment of Judge Bork's views of the history and tradition from which this nation was conceived.

Professor Kurland said:

My concern is very much that by providing as narrow a construction of the Constitution as possible with regard to individual rights and liberties, Judge Bork would be denying the essence of the purpose behind the Constitution's origins 200 years ago, which was the preservation of all the liberties that the English legal tradition had created and were in the process of creating and were expected to continue to create. (Comm. Print Draft, Vol. 3, at 1390.)

Similarly, Professor Tribe testified:

He [Judge Bork] reads the entire Constitution as though the people who wrote and ratified it gave up to government all of the fundamental rights that they fought a revolution to win unless a specific reservation of rights appears in the text. . . . I am proud that we have . . . a 200-year-old tradition establishing that people retain certain unspecified fundamental rights that courts were supposed to discern and to defend. (Comm. Print Draft, Vol. 2, at 6-7.)

* * * * *

Judge Bork's narrow definition of liberty sets him apart from the tradition and history from which this nation was conceived. As Professor Kurland testified:

Judge Bork's judicial philosophy . . . reveals an unwillingness to recognize that the principal objective of the framers of our Constitution two hundred years ago was the preservation and advancement of individual liberty. Liberty was indeed the watchword of the national convention and of the state ratifying conventions as well. The Constitution did not create individual rights; the people brought them to the Convention with them and left the Convention with them, some enhanced by constitutional guarantees. The Bill of Rights in guaranteeing more, made sure that none was adversely affected. (Comm. Print Draft, Vol. 3, at 1387.)

Judge Bork's definition of liberty also sets him apart from every Justice who has ever sat on the Supreme Court. Indeed, it is because of the Court that "an established part of our legal tradition [is] to view the Constitution as forbidding government abuses which, in the words of Justice Frankfurter, 'offend those canons of decency and fairness which express the notions of justice of Eng-

lish-speaking peoples.' " (Coleman Statement at 12, *quoting Adamson v. California*, 332 U.S. 46, 59, 66-67 (1947) (Frankfurter, J., concurring).)

II. THE THEORY OF PRECEDENT OR "SETTLED LAW" HELD BY JUDGE BORK CANNOT TRANSFORM HIS JUDICIAL: PHILOSOPHY INTO AN ACCEPTABLE ONE FOR THE SUPREME COURT

A. While Judge Bork's Theory of Precedent Appears to Lessen the Friction Between His Philosophy of Original Intent and Accepted Supreme Court Decisions, It Leaves Many Uncertainties and Concerns

Judge Bork has applied his theory of the Constitution to attack a large number of Supreme Court decisions, including many landmark cases. Reconsidering these cases would reopen debate on many significant issues. Perhaps this is why Judge Bork said in response to a question by Senator Thurmond, "anybody with a philosophy of original intent requires a theory of precedent." (Comm. Print Draft, Vol. 1, at 101.) While a theory of precedent appears to lessen the friction between Judge Bork's philosophy and accepted Supreme Court decisions, it creates in the end many uncertainties and concerns of its own.

Prior to the hearings, Judge Bork had occasionally expressed the view that some decisions ought now to be upheld, even though wrong under his theory of original intent. The hearings, however, provide by far the most extended discussions by Judge Bork of his theory of precedent.

Under questioning by Senator Thurmond, for example, Judge Bork said:

What would I look at [before overruling a prior decision]? Well, I think I would look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. And if it is wrongly decided—and you have to give respect to your predecessors' judgment on these matters—the presumption against overruling remains, because it may be that there are private expectations built up on the basis of the prior decision. It may be that governmental and private institutions have grown up around that prior decision. There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine. (Comm. Print Draft, Vol. 1, at 101.)

In other places, Judge Bork encapsulated these thoughts by saying that law, even erroneous law, can become "settled," meaning it should not be overruled. (See, e.g., Comm. Print Draft, Vol. 1, at 84, 414.)

Later, in response to a question from Senator Heflin, Judge Bork added countervailing considerations—considerations that argued in favor of overruling a precedent:

Now, of course, against [upholding a precedent] is—if it is wrong, and secondly, whether it is a dynamic force so that it continues to produce wrong and unfortunate decisions. I think that was one of the reasons the court in *Erie Rail-*

road against *Tompkins* overruled *Swift* against *Tyson*, a degenerative force, but I think what Brandeis or somebody can maybe call dynamic potential. (Comm. Print Draft, Vol. 1, at 268.)

An exchange with Chairman Biden produced a further statement on these countervailing considerations:

[A] case should not be overruled unless it was clearly wrong and perhaps pernicious, "pernicious" . . . meant there in the sense of capable of having dynamic force, generative force, that would produce new wrong decisions. (Comm. Print Draft, Vol. 1, at 297.)

Finally, Judge Bork concluded his testimony by emphasizing his respect for precedent:

[T]here are views I have testified to here that reaffirm my acceptance of a body of jurisprudence as established and no longer judicially assailable, notwithstanding, that [it] has developed in a manner different from a direction I had suggested [W]hen I say [the result in a case is required by] "the law," I regard precedent as an important component of the law. As I have described many times here, there are a number of important precedents that are today so woven into the fabric of our system that to change or alter them would be, in my view, unthinkable. (Comm. Print Draft, Vol. 1, at 721-22.)

The committee finds that Judge Bork's ideas concerning precedent or settled law, in both their general terms as well as the manner in which Judge Bork applies them to particular cases, raise a number of serious concerns.

B. Judge Bork's Combination of Original Intent and Settled Law Creates an Irresolvable Tension Between His Oft-Repeated Desire to Reformulate Constitutional Law and His Willingness to Follow a Decision He Believes To Be Profoundly Wrong

1. Judge Bork Has Often Announced His Firm Conviction that Many Supreme Court Decisions Are Flatly Wrong and Ought To Be Overruled

Judge Bork's embrace of precedent sets up a sharp tension with his often repeated proclamations of the ease with which a judge with his views can overrule erroneous decisions. Judge Bork's record, in fact, strongly suggests a willingness to "reformulate" "broad areas of constitutional law." ("Neutral Principles" at 8.)

In January of this year, for example, Judge Bork claimed:

Certainly at the least, I would think that an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. (remarks to the *First Annual Lawyers Convention of the Federalist Society*, January 31, 1987, at 126.)

In a speech delivered before an Attorney General's conference in 1986, he observed:

The Court's treatment of the Bill of Rights is theoretically the easiest to reform. It is here that the concept of original intent provides guidance to the courts and also a powerful rhetoric to persuade the public that the end to [judicial] imperialism is required and some degree of reexamination desirable. ("Federalism," *Attorney General's Conference Speech*, January 24-26, 1986, at 9.)

Prior to the hearings, Judge Bork seemed to elevate his views of original intent over respect for precedent: "Supreme Court justice[s] can always say . . . their first obligation is to the Constitution, not to what their colleagues said 10 years before." ("Justice Robert H. Bork: Judicial Restraint Personified," *California Lawyer*, May 1985, at 25.) During the hearings, Senator Kennedy played an audio tape of the question and answer period following a 1985 speech in which Judge Bork made perhaps his clearest declaration to that effect:

I don't think that in the field of constitutional law precedent is all that important. I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important. The reason being that if you construe a statute incorrectly, the Congress can pass a law and correct it. If you construe the Constitution incorrectly Congress is helpless. Everybody is helpless. **If you become convinced that a prior court has misread the Constitution I think it's your duty to go back and correct it.** Moreover, you will from time to time get willful courts who take an area of law and create precedents that have nothing to do with the name of the Constitution. And if a new court comes in and says, 'Well, I respect precedent,' what you have is a ratchet effect, with the Constitution getting further and further away from its original meaning, because some judges feel free to make up new constitutional law and other judges in the name of judicial restraint follow precedent. **I don't think precedent is all that important. I think the importance is what the Framers were driving at, and to go back to that.** (*Canisius College Speech*, October 8, 1985, quoted in Comm. Print Draft, Vol. 1, at 523-24, emphasis added.)

Following the playing of this tape, the following exchange took place:

Senator KENNEDY. Those statements speak for themselves. Your own words cast strong doubt upon your adherence to precedent that you think is wrong.

Judge BORK. Senator, you and I both know that it is possible, in a give and take question and answer period, not to give a full and measured response. You and I both know that when I have given a full and measured response, I have repeatedly said there are some things that are too settled to be overturned

It is not the kind of thing that ought to be weighed against my more considered statements when I am not just engaging in give and take. (Comm. Print Draft, Vol. 1, at 527.)

The committee finds that even accepting this explanation, Judge Bork's views pose a serious dilemma. Judge Bork has strongly suggested a reformation in constitutional law, one that will bring a "second wave in constitutional theory." Although perhaps open to differing interpretations, the committee is concerned that the "second wave" is aimed at reform in the courts—in the decisions courts reach, not just in the classroom as some academic exercise. (See "The Crisis in Constitutional Theory: Back to the Future," *Speech to the Philadelphia Society*, April 3, 1987, at 10-15, *quoted in* Comm. Print Draft, Vol. 1, at 672-77.) Against this drive to pursue his views on original intent, and to "sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea" (Comm. Print Draft, Vol. 1, at 677), Judge Bork has erected the breakwater of his theory of precedent. The question is: How much will it hold back?

At the very least, Judge Bork's opposing forces pose a dilemma for litigants. As Robert Bennett, Dean of the Northwestern University School of Law, testified:

A moment's reflection will show that it will not do to say that a case was wrong but I will not vote to overrule it. What are lawyers and litigants to do with that case when the next one arises that is a little bit different? Are they to appeal to what the judge says is constitutionally right or to the precedent he says he will tolerate, even though it is wrong?

To be sure, all judges suffer from this dilemma to a degree, but few insist that they know the route to constitutional truths with the vehemence that Judge Bork does. For that reason, I remain baffled and concerned about Judge Bork's likely approach to the use of precedent, despite the assurances he has offered. (Comm. Print Draft, Vol. 3, at 1224.)

The committee believes there is a substantial risk that Judge Bork would resolve this dilemma by reading a prior decision very narrowly, so that it had little, if any, substantial effect on future decisions, notwithstanding that it is never overruled. In Judge Bork's terms, a prior decision can lose its "dynamic" or "generative" force through another kind of barren reading, this time of the past decision itself. As Professor Gewirtz testified:

[M]ost lawyers recognize that precedents are generally capable of either a broad or restrictive reading. . . . Given the leeway that judges inevitably have . . . I think it's reasonable to conclude that Judge Bork will read decisions he disagrees with restrictively, and that means, of course, that in the closely contested cases, that are the sort of cases that come to the Supreme Court, it is likely that Judge Bork would decide the earlier decisions he believes were wrongly decided simply don't control the matter in question. (Testimony of Paul Gewirtz, Comm. Draft Print,

Vol. 2, at 1171; see also Remarks of Senator Specter, Comm. Print Draft, Vol. 1, at 255; Testimony of Burke Marshall, Comm. Print Draft, Vol. 1, at 832; Tribe statement, Comm. Print Draft, Vol. 2, at 32-34.)

The committee finds that there are substantial uncertainties in the extent to which Judge Bork's respect for settled law would operate as a serious curb on his pursuit of his idea of original intent. All that is necessary is to understand what one witness called the "lens effect:" Judge Bork would simply see future cases through a lens that embodied his own strong views about original intent and would thereby be highly likely to see the erroneous, but settled decisions, as inapplicable to new situations. (See statement of Thomas Grey, Comm. Print Draft, Vol. 2, at 1106.)

2. Judge Bork's Testimony on the First Amendment's Clear and Present Danger Standard Demonstrates that a Judge Who "Accepts" Precedent with Which He Disagrees May Well Read that Precedent Narrowly

In the early part of this century, Justices Holmes and Brandeis argued in now-famous dissents that speech critical of the government may be punished only when it presents a "clear and present danger." (See *Abrams v. United States*, 150 U.S. 616 (1919) and *Gitlow v. New York*, 268 U.S. 652 (1925).) The Supreme Court has accepted these dissents as expressing the correct view of the First Amendment and has articulated its most recent formulation of the "clear and present danger" standard in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Judge Bork's testimony on *Brandenburg* provides an excellent insight into the uncertainties associated with his theory of precedent.

As Senator Specter said, *Brandenburg* "essentially state[s] the Holmes' clear and present danger doctrine" (Comm. Print Draft, Vol. 1, at 254), and prohibits a state from punishing speech advocacy unless it involves "incitement to imminent lawless action." Prior to the hearings, Judge Bork had criticized *Brandenburg* as "fundamentally wrong." ("The Individual, the State, and the First Amendment," *University of Michigan* (1979), at 19.) Before the committee, however, he first testified: "I think *Brandenburg* is fine. I am not concerned about it." (Comm. Print Draft, Vol. 1, at 255.) The next day, in response to a question by Senator Thurmond, Judge Bork expanded on his position concerning *Brandenburg*:

I had really said, I did say that I thought theoretically the advocacy of law violation in . . . circumstances [not involving a claim that the law being challenged was unconstitutional] could have been punished under the First Amendment. What *Brandenburg* did was say there must be a closer nexus between the advocacy and the lawless action. It said the advocacy of law violation must be in circumstances where there is the likelihood of imminent lawless action. So it added one factor to what I said, the closeness of the danger.

Now, I have not changed my mind about what I said upon this subject. I could have accepted a First Amend-

ment law that developed the way I thought in 1971 it ought to have from the beginning. I could accept that.

The law did not develop that way. It developed to require a closer nexus between the advocacy and the violent action or the lawless action, imminent lawless action. . . .

I accept the fact that the Supreme Court has added an additional safeguard to the position that I took in 1971 for speech advocating lawlessness. As an academic, I thought that was not theoretically justified. As a judge, I accept it, and that is all there is to that. (Comm. Print Draft, Vol. 1, at 311.)

Later the same day, responding to Senator Specter, Judge Bork said of *Brandenburg*, "I accept *Brandenburg* as a judge and I have no desire to overturn it. I am not changing my criticism of the case. I just accept it as settled law." (Comm. Print Draft, Vol. 1, at 409.)

Senator Specter then identified the difficulty with Judge Bork's views:

[T]hat brings up the subject down the line as to original intent and how firmly committed you are to accepting stare decisis, and there are some strong statements which you have made that an originalist ought not to accept cases which have been established. . . .

One, the next case will have a shading and a nuance and I am concerned about your philosophy and your approach. And, secondly, I am concerned about your acceptance of these cases. If you say you accept this one, so be it. But you have written and spoken, ostensibly as an original interpretationist, of the importance of originalists not allowing the mistakes of the past to stand. (Comm. Print Draft, Vol. 1, at 410-11.)

Professor Gewirtz made the same point, albeit in different terms:

Brandenburg is usually said to hold that advocacy may be punished only if it involved "incitement to imminent lawless action." But the Supreme Court concluded that the Ohio statute was unconstitutional on its face; read narrowly, *Brandenburg's* "holding" could be limited to that, and not read as a rule about what particular degree or kind of proximate danger is constitutionally required. Furthermore, . . . if Judge Bork does not accept the "intellectual and historic and traditional underpinning" of the clear-and-present-danger requirement—if he does not genuinely accept the premises for protecting extreme speech—then he may end up applying clear-and-present-danger standards in a more restrictive way than others would. He might, for example, "accept" *Brandenburg* in the sense of requiring more than mere advocacy to sustain a conviction, but nevertheless uphold a conviction based on jury instructions that require a somewhat lesser degree of imminence of harm than other readings of *Brandenburg* might suggest. (Statement of Paul Gewirtz, Comm. Print Draft, Vol. 2, at 1185-86.)

These statements were not made only in the abstract. In *Hess v. Indiana*, 414 U.S. 105 (1973), the Supreme Court reviewed the conviction of an anti-war demonstrator for using a vulgar word in promising a return to the streets after he had been removed by the police. The Court reversed the conviction on the ground that because the lawless action was not imminent, the demonstrator's advocacy could not be proscribed. The Court treated the case as one controlled by *Brandenburg*.

In the hearings, however, Judge Bork did not find that *Brandenburg* controlled the facts presented by *Hess*. In an exchange with Senator Specter, he said that in his view, *Hess* was an "obscenity in the public streets" case, not a case involving dissident political speech, and he was not "so wild about it." (Comm. Print Draft, Vol. 1, at 411.)

Judge Griffin Bell, who testified on Judge Bork's behalf, seems to concur with this analysis. After Senator Specter described the facts of *Hess*, Judge Bell stated:

Well, I am not familiar with the *Hess* case, but that would bother me if somebody said they would do something and then they immediately figure a way to get around it I do not think you could make an obscenity case out of the facts as you stated them. I mean, I do not think that could be seriously argued that that was an obscenity case. It is a speech case. (Comm. Print Draft, Vol. 3, at 1377.)

Judge Bork's colloquy with Senator Specter, and the analysis of his remarks by Senator Specter and Professor Gewirtz, illustrate the uncertainties and risks with Judge Bork's theory. If *Hess v. Indiana* had not yet been decided, and Judge Bork were confirmed, it is clear that he would be able to dissent in *Hess*, treating it as an obscenity case—and yet remain faithful to everything he said in the hearings about precedent generally, and everything he said about his faithfulness to *Brandenburg* specifically.

This is only one example of the ways in which the statements Judge Bork made in the hearings leave substantial uncertainties about how he would "follow precedent," on the one hand, and how he would pursue his version of original intent, on the other hand. (See also Gewirtz statement, Comm. Print Draft, Vol. 2, at 1183-1186.)

C. Judge Bork's Theory of Settled Law Applies Less to Cases Extending Individual Liberties than to Cases Making Structural or Institutional Changes in Government, And Thus Would Not Protect Those Individual Rights Cases that Judge Bork Has Criticized

Judge Bork has said that "the Court's treatment of the Bill of Rights is theoretically the easiest to reform." (*Attorney General's Conference Speech*, Jan. 24-26, 1986, at 9.) Decisions involving the Bill of Rights largely involve the expansion of individual rights. As such, complex social institutions and economic structures do not usually build up around them. They are thus typically different from cases like those expanding the power of Congress to regulate commerce or the power of the U.S. government to issue paper money as legal tender. These latter cases have become, in Judge

Bork's words, "the basis for a large array of social and economic institutions, [therefore] overruling them would be disastrous." (Comm. Print Draft, Vol. 1, at 102.) If such institutions have not grown up around Bill of Rights cases, they are to that extent easier to reform. As Professor Grey explained:

These examples [of the Commerce Clause and the Legal Tender Cases] illustrate the very weak character of the constraints imposed by precedent on the overruling of "erroneous" constitutional precedent. **In both cases, the protected precedents expanded governmental power.** In both cases, any attempt to overrule them would involve social upheavals of vast dimensions, and would be completely impractical. **Decisions defining and protecting individual constitutional rights rarely if ever are so socially entrenched.** It is difficult to think of any individual rights decision or line of decisions that, if overruled, would present the intractable practical difficulties posed by the cases Judge Bork has used as examples. Indeed, I have not found any example in his pre-nomination discussions of the doctrine of precedent of any constitutional decision protecting individual rights that he identifies as even presumptively immune from overruling. (Grey Statement, Comm. Print Draft, Vol. 2, at 1108; emphasis added.)

During the committee hearings, Judge Bork for the first time made some specific references to individual rights decisions that were, in his view, "settled." They were *Brandenburg*, *Shelley v. Kraemer* and *Bolling v. Sharpe*, and some of the freedom of the press cases. Each is, to varying degrees, difficult to square with Judge Bork's announced criteria for refusing to overrule a decision. Even putting that aside, however, there still is a tremendous area—in which the Court has given content to unenumerated rights and liberties—where his prior stated positions are not in the least constrained by his statements before the committee concerning settled law.

D. Judge Bork's Statements About the Application of Settled Law to Old Conflicts Say Little About His Willingness To Apply the Tradition of Unenumerated Rights to New Conflicts Between Government and the Individual that May Arise

The Supreme Court's prior decisions, whether settled or not, cannot cover all new situations, under even the broadest reading of those cases. It is in the context of these new cases that Judge Bork's theory of original intent would stand without any of the constraining influence of precedent. Thus, that "Judge Bork's record is . . . a source of concern because of what it reveals about how he is likely to approach novel issues of liberty and equality that will emerge in the years ahead, issues where a Justice has a leeway that is not closely channelled by precedent." (Gewirtz statement, Comm. Draft Print, Vol. 2, at 1186.)

In the committee's view, respect for precedent, as Judge Bork expressed it, does not alleviate the concern that the nominee would pursue his particular theory of original intent. It does not remove the risk that important precedents preserving individual liberties

and human dignity would be robbed of their generative force. And it in no way compensates for his rejection of the tradition of unenumerated rights, a tradition that must be maintained to deal with new issues as they arise in the future.

PART THREE: A CRITICAL ANALYSIS OF JUDGE BORK'S POSITIONS ON LEADING MATTERS

I. THE RIGHT TO PRIVACY—THE RIGHT TO BE LET ALONE

A. Before the Hearings, the Right to Privacy Had Been a Principal Part of Judge Bork's Attack on the Supreme Court

The constitutional right to privacy or, in Justice Brandeis's words, the right to be let alone, has been a major part of Judge Bork's attack on the jurisprudence of the Supreme Court. In 1971, for example, he denounced the first modern privacy decision, *Griswold v. Connecticut*, 381 U.S. 479 (1965), as "unprincipled" and "intellectually empty." *Griswold* concerned a law making it a crime for anyone to use birth control. Judge Bork said that the desire of a "husband and wife to have sexual relations without unwanted children" was indistinguishable, for constitutional purposes, from the desire of an electric utility company to "void a smoke pollution ordinance." "The cases," he said, "are identical." ("Neutral Principles" at 8-9.)

Judge Bork reiterated his attack on *Griswold* after becoming a federal court judge. In a 1982 speech, he said that "the result" in the case could not "have been reached by interpretation of the Constitution." (*Catholic University Speech* at 4.) In 1985, he announced that there was no "supportable method of reasoning underlying" *Griswold*. (*Conservative Digest* Interview, October 1985, at 97.) In 1986, he declared that replacing the approach in *Griswold* with a "concept of original intent" is "essential to prevent courts from invading the proper domain of democratic government." ("The Constitution, Original Intent, and Economic Rights," 23 *San Diego L. Rev.*, 823, 829 (1986).)

In an interview given after he was nominated to the Supreme Court, Judge Bork was asked: "But your core views on privacy expressed in [the 1971 *Indiana Law Journal* article]—you still believe?"

Answer. "Yes. I agreed with Justice Black, who dissented in that case, *Griswold v. Connecticut*." (July 29, 1987, *St. Louis Post-Dispatch*.)

Judge Bork's attacks on the privacy right have extended to the principal cases upon which *Griswold* relied, and would extend, presumably, to all the cases subsequent to *Griswold*, although Judge Bork has identified only *Roe v. Wade* by name. (*Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 97th Cong., 1st Sess., June 10, 1981, at 310.)

One of the cases relied upon by the Court in *Griswold* was *Skinner v. Oklahoma*. 316 U.S. 535 (1942). There, the Supreme Court unanimously set aside a state law that imposed sterilization upon

certain common criminals, but not upon embezzlers or other white collar criminals. Said the Court: "We are dealing here with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (*Id.* at 541.) Judge Bork has analyzed *Skinner* as follows:

All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental interests," in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases [such as] *Skinner*. ("Neutral Principles" at 11-12.)

In speeches and writings after he became a judge, the nominee has also said that the "'right of procreation' . . . is another made-up constitutional right . . . Neither it [nor the right] to privacy are to be found anywhere in the Constitution."⁶ ("Foundations of Federalism: Federalism and Gentrification," *Yale Federalist Society*, April 24, 1982, at 9 of the Question and Answer Period; see also "The Struggle Over the Role of the Courts," *National Review*, September 17, 1982, 1137, 1138; "A Conference on Judicial Reform," *Free Congress and Education Foundation*, June 14, 1982, at 6.)

Judge Bork addressed the Supreme Court's line of privacy decisions in two opinions on the Court of Appeals. In *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), he wrote that the Supreme Court had created "new rights" in the privacy cases. Judge Bork recited the holdings in a number of those cases, and concluded that since they lacked an "explanatory principle," (*Id.* at 1395-96), lower court judges could not determine how to apply them in new cases.

In *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983), Judge Bork went out of his way in his concurring opinion to criticize the majority opinion for finding that the privacy decisions of the Supreme Court implied some constitutional protection for the right of a non-custodial father to maintain visitation rights with his child. Judge Bork argued that the right of privacy was "ill-defined," and that "[s]ince the Constitution itself provides neither textual nor structural guidance to judges embarked upon this chartless sea, it behooves us to be cautious rather than venturesome." (707 F.2d at 1438.)

As a lower court judge, the nominee was, of course, bound to abide by *Griswold* and its progeny. Judge Bork acknowledged this very point in *Dronenburg*, stating that his arguments against *Griswold* and the other privacy cases were "completely irrelevant to the function of a circuit judge. The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination." (*Dronenburg*, 741 F.2d at 1396 n. 5.) In the committee's view,

⁶ During the hearings, Judge Bork suggested that he might have reached the same result the Court did in *Skinner* by applying a "reasonableness test" under the Equal Protection Clause. Whether or not he would do so, however, Judge Bork has made clear that he rejects the right of procreation in *Skinner*.

however, Judge Bork's opinions in *Dronenburg* and *Franz* suggest that there is a significant risk that he would to overrule *Griswold* and the other privacy cases if freed of the constitutional and institutional constraints that limit a lower court judge.

Judge Bork's strong attack on the Court's line of privacy decisions left no doubt before the hearings about his position. In an interview given just before coming before the committee, however, Judge Bork interjected into his discussion of *Griswold* what might be construed as a qualification:

The court did not dispose of it in a logical way, on the basis of sound constitutional reasons. A lot of cases in which the court's reasoning isn't adequate might conceivably come out the same way on adequate reasons. I [once] said something rather harsh about *Roe v. Wade*, but [what I said] really applied more to the line of reasoning that was followed. ("Sentences From the Judge," *Newsweek*, September 14, 1987, at 36.)

This proffered distinction between the Court's reasoning and the result it reaches was a major topic at the hearings.

B. At the Hearings, Judge Bork Confirmed His Pre-Hearing Views About a Right to Privacy

At the hearings, Judge Bork repeated in various ways the claim that although "[t]here is a lot of privacy in the Constitution," (Comm. Print Draft, Vol. 1, at 217), there is no "generalized" right to privacy of the kind necessary to support *Griswold* and its progeny. He testified that in the Constitution there is no "unstructured, undefined right of privacy [such as the right] that Justice Douglas elaborated [in *Griswold*]." (Comm. Print Draft, Vol. 1, at 87.) Senator Simpson and Judge Bork engaged in the following exchange:

Senator SIMPSON. I want to ask you if it is fair to say that you believe that privacy is protected under the Constitution, but that you just do not believe that there is a general and unspecified right that protects everything. . . . Is that correct?

Judge BORK. That is correct, Senator. (Comm. Print Draft, Vol. 1, at 217.)

When Senator Hatch queried him about Justice Black's view of the "so-called privacy right," Judge Bork seemed to endorse the view that the right "was utterly unpredictable." (Comm. Print Draft, Vol. 1, at 157.) He described his objection to a "generalized" right to privacy:

Nobody knows what that thing means. But you have to define it; you have to define it. And the court has not given it definition. That is my only point. (Comm. Print Draft, Vol. 1, at 218.)

At this juncture, Judge Bork's objection seemed to be that the Court had not defined the privacy right sufficiently, so that it is "utterly unpredictable."

It became clear, however, that Judge Bork also believes that there is no constitutional right extending privacy protections

beyond those provided by specific amendments. As summarized by Chairman Biden:

Yesterday you indicated that although you did not like the generalized right of privacy or use of substantive due process, you time and again pointed out that certain core ideas were protected and they were protected by the First Amendment, you pointed out. Privacy. First Amendment, Fourth Amendment, Fifth Amendment, Eighth Amendment. You went down the list.

Now, what I would like to ask you is this. If Justices Harlan, Powell, Frankfurter, Jackson, Cardozo had found a fundamental right of privacy or a fundamental right to be protected under another specific amendment to the Constitution, there would not have been any occasion to see that the Constitution also contains the basic right of privacy.

Obviously they could not find it in any single amendment. Therefore, my question is, putting aside all the specific amendments you have mentioned either now or during the past several days, do you believe that the Constitution recognizes a marital right to privacy? (Comm. Print Draft, Vol. 1, at 300.)

Judge Bork responded: "I do not know. It may well . . . But I have never worked on a constitutional argument in that area." (*Id.*) In a colloquy with Senator DeConcini, Judge Bork suggested that the equal protection clause might be an alternative basis for reaching the same result as the Court did in *Griswold*. (Comm. Print Draft, Vol. 1, at 300.)

In his testimony before the committee, therefore, Judge Bork returned to the distinction, first articulated in his September 14, 1987 *Newsweek* interview, between reasons and results. This distinction ultimately failed, however, to leave any prospect that a rationale for the right to privacy satisfactory to Judge Bork could ever be found.

First, Judge Bork testified that *Griswold* did not contain a correct understanding of the liberty and due process clauses of the Fourteenth Amendment: "Well, if they apply the due process clause that way Why not in *Griswold v. Connecticut* and why not in all kinds of cases? You are off and running with substantive due process which I have long thought is a pernicious constitutional idea." (Comm. Print Draft, Vol. 1, at 262.) Second, he testified that the Ninth Amendment provided no justification for the result in *Griswold*. (Comm. Print Draft, Vol. 1, at 102-03; 224-25; 241.) Third, he said he would have dissented in *Griswold*. (Comm. Print Draft, Vol. 1, at 573.) Finally, in response to Senator Heflin, Judge Bork testified, "I do not have available a constitutional theory which would support a general, defined right [of privacy]." (Comm. Print Draft, Vol. 1, at 266.)

Thus, Judge Bork has rejected all the offered rationales for a right to privacy of the sort necessary to support *Griswold* and its progeny, as well as the entire constitutional tradition of unenumerated rights upon which it rests. It appears that Judge Bork adheres to his earlier view that "the result" in *Griswold* could not be

reached by "interpretation" of the Constitution. (*Catholic University Speech* at 4.) At the same time, he left open the possibility that "maybe somebody would offer" him a new argument for the right that he would accept. (Comm. Print Draft, Vol. 1, at 90.)

In the committee's view, it is unlikely that a successful new argument will be proffered. As several witnesses testified, the arguments in support of a right to privacy have in the course of our constitutional history been presented; indeed, they were all summarized or alluded to in the *Griswold* case itself. (See Comm. Print Draft, Vol. 3, at 1611-13; Tribe testimony, Comm. Print Draft, Vol. 2, at 45 ("I do not think that constitutional law is a game of hide and seek. The idea that there might be a right hiding there from Judge Bork to be discovered in the next decade . . . is not very plausible").) Given Judge Bork's extensive experience in analyzing these matters, his steadfast rejection of the tradition of unenumerated rights and his professed inability thus far to find any constitutional warrant for such a right, there is little, if any, prospect that a new argument will be presented that is both unique and convincing to him.

As Chairman Biden concluded after two-and-a-half weeks of hearings:

Will [Judge Bork] be part of the progression of 200 years of history of every generation enhancing the right to privacy and reading more firmly into the Constitution protection for individual privacy? Or will he come down on the side of government intrusion? I am left without any doubt in my mind that he intellectually must come down for government intrusion and against expansion of individual rights. (Comm. Print Draft, Vol. 3, at 1615.)

C. Judge Bork's Denial of the Right to Privacy Places the Entire Line of Privacy Decisions at Risk, and Is Likely to Prevent Any Subsequent Development and Extension of It

During the hearings, Judge Bork expounded on his theory of "settled law"—of accepting past cases even though they were wrong. He offered to the committee new examples of cases with which he still disagreed, but which he would not overrule because they had become, in his view, settled law. (See Part Two, Section II, *supra*.) Judge Bork did not include within his examples any of the privacy decisions. Accordingly, Judge Bork left the committee with the clear impression that he feels free to overrule any or all of the privacy decisions. And given his conclusion that the doctrine of substantive due process is "pernicious." (Comm. Print Draft, Vol. 1, at 262), there is a substantial risk of overruling.

The committee recognizes that Judge Bork testified that he would entertain arguments that these cases were the sort that should not be overruled. (See *e.g.*, Comm. Print Draft, Vol. 1, at 268.) At the very least, however, he can be expected to limit them to their narrow facts. To do otherwise would mean that they would continue to operate as a "generative" force in the law, producing new erroneous decisions. (See Part Two, Section II, *supra*.) Thus, if he did not overrule these cases, there is a substantial risk that he would certainly leave the right to privacy inapplicable to future

cases. The manner in which he analyzed the privacy cases in *Dronenburg* and *Franz* provides a partial insight into how he might eviscerate the right to privacy.

As Professor Sullivan testified, Judge Bork's views on privacy place him in a lonely position:

On the scope of the right to privacy, good and reasonable, fair-minded men and women differ greatly, and in good faith, and that has happened, it is happening now, and I expect it to continue as long as there is a right of privacy to argue about.

But there has been no disagreement on the Supreme Court, for 75 years, that there exists some right to privacy, and it is that disagreement of Judge Bork that we are focusing on.

There are two sides to the issue on its scope, but there have not been, in our jurisprudence, two sides of the issue as to its existence, and that is what puts Judge Bork outside the mainstream. (Comm. Print Draft, Vol. 3, at 1621; emphasis added.)

After this testimony, Senators Biden and Simpson engaged in the following colloquy:

The CHAIRMAN. I want to make it clear, that as I understand what Judge Bork has said, he disagreed with the existence of a generalized right to privacy, and in that sense he is all by himself in the line of justices for the past 75 years. . . . That is the debate. If I am wrong about that, I would like to be corrected now. . . . [T]his is so fundamental a point.

Senator SIMPSON. Mr. Chairman, it is, indeed, and in one sentence let me say that Judge Bork—and he said it so clearly—his problem with the abstract constitutional right of privacy is that it has no inherent limits. . . .

The CHAIRMAN. You are correct that Judge Bork said that there are no inherent limits. Ergo, he has concluded, because he cannot find a way to put limits upon it, like other judges have, because he does not want to be subjective, which he says he rejects out of hand and worries about. Because he cannot place—there are no inherent limits—he chooses to deny the existence of the right in the first instance. (Comm. Print Draft, Vol. 3, at 1621-22; emphasis added.)

The Chairman's conclusion suggests that by rejecting the tradition of unenumerated rights, including the right to privacy, Judge Bork may place his desire to minimize the influence of judges in society above his own first principle, faithfulness to the original intent.

In the committee's view, one additional point about the Supreme Court's privacy cases merits brief mention. The Court in these decisions has not been floating, as Judge Bork has said, on a "chartless sea," (*Franz*, 707 F.2d at 1438), constructing unpredictable rights that strike without warning. It has been constrained and guided by the text, history and structure of the Constitution, together with

the history, tradition and collected wisdom expressed in the Supreme Court's decisions. As Professor Sullivan testified, "[the Justices] have said look to our traditions, look to our values." In doing that, the Court has articulated a right that "doesn't strike without warning. It has been an extraordinarily limited right as expounded by the Supreme Court so far." (Comm. Print Draft, Vol. 1, at 1634, 1640.)

* * * * *

The rights recognized by the Supreme Court have been tremendously important, and promise to continue to be so into the future. Consider what our nation would have been like had the Court not implemented the history and tradition of the Constitution:

It would not have affirmed a right "to marry, establish a home and bring up children." (See *Meyer v. Nebraska*, 262 U.S. 390 (1923).)

It would not have prevented the government from making it a crime to send children to private school. (See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).)

It would not have prohibited the government from sterilizing a selected group of criminals; nor could it protect other citizens from interferences with reproduction. (See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).)

It would not have intervened to stop a government from outlawing the use of birth control by married couples (See *Griswold v. Connecticut*, 381 U.S. 479 (1965)), **or by others.** (See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).)

It would have to stand idly by while a government prevented a grandmother from taking an orphaned grandson into her home. (See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).)

It would not have recognized marriage as a fundamental right to be protected against unjustified laws interfering with its exercise by the poor or those in prison. (See *Zablocki v. Redhail*, 434 U.S. 374 (1976); *Turner v. Safley*, 107 S. Ct. 2254 (1987).)

The committee believes that Judge Bork's position on the right to privacy exposes a fundamentally inappropriate conception of what the Constitution means. Judge Bork's failure to acknowledge the "right to be let alone" illuminates his entire judicial philosophy. If implemented on the Supreme Court, that philosophy would place at risk the salutary developments that have already occurred under the aegis of that right and would truncate its further elaboration.

II. CIVIL RIGHTS

Throughout his career, Judge Bork has consistently expressed harsh criticism of, and opposition to, Supreme Court decisions and legislation securing civil rights for all Americans. The committee believes that Judge Bork's unfailing criticism of landmark developments advancing civil rights, and his marked failure in numerous writings and speeches to suggest alternative methods of securing those advances, reflect a pronounced hostility to the fundamental role of the Supreme Court in guarding our civil rights.

A. Judge Bork Has Opposed Civil Rights Legislation

The struggle to end race discrimination in America was one of the greatest moral tests faced by our Nation. In the 1960's, thoughtful men and women of all races and from all parts of the country came to realize that legislation was urgently needed to put an end to segregated lunch counters and "whites only" wait ads.

In 1963 and 1964, while an associate professor at Yale Law School, Judge Bork vigorously and publicly opposed the legislation banning discrimination in employment and public accommodations that ultimately became Titles II and VII of the Civil Rights Act of 1964. In August 1963—the same month that Dr. Martin Luther King, Jr. led the March on Washington to secure the passage of the Civil Rights Act—Judge Bork wrote in *The New Republic* that the principle underlying the proposed ban on discrimination in public accommodations was one of "unsurpassed ugliness." (*Civil Rights—A Challenge*, August 31, 1963, at 22.) And in a March 1, 1964 article in the *Chicago Tribune*, Judge Bork opposed both the public accommodations and the employment provisions of the bill because they would—in his words—"compel association even where it is not desired." (*Against the Bill*, at 1.) Judge Bork also asserted that there were "serious constitutional problems" with the public accommodations provision of the bill, a position unanimously rejected by the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

At the time that Judge Bork's article in the *The New Republic* was published, Nicholas deB. Katzenbach was Deputy Attorney General of the United States. Mr. Katzenbach later served as Attorney General from 1964-1966. During his testimony, Mr. Katzenbach eloquently described the impact of that article:

His 1963 article in *The New Republic* . . . is one that I remember very well. It was then, and is now, absolutely inconceivable to me that a man of intelligence and perception and feeling could have opposed that legislation on the grounds that it deprived people of freedom of association.

It meant, and it could only have meant, that he valued the right of people in public situations to discriminate against blacks if that is what they chose to do. What kind of judgment does that demonstrate? (Comm. Print Draft, Vol. 1 at 870.)

As Judge Bork admitted during the hearings, he did not publicly modify his views about the Civil Rights Act until his 1973 confirmation hearings to be Solicitor General. (Comm. Print Draft, Vol. 1, at 126.) (See *Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General*, Hearings Before the Senate Committee on the Judiciary January 17, 1973, at 14.) While the Committee does not question the sincerity of Judge Bork's recantation, we believe that his earlier strident and outspoken opposition to the public accommodations and employment provisions of the Civil Rights Act of 1964 may properly be taken into account in reaching our conclusion that the nominee lacks the sensitivity and commitment to assuring equal justice under law for all Americans that any Supreme Court Justice should possess.

B. Judge Bork Has Criticized the Decision Banning Enforcement of Racially Restrictive Covenants

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court unanimously held that the Fourteenth Amendment prohibited enforcement of racially restrictive covenants in residential real property agreements. In his *Indiana Law Journal* article, Judge Bork was harshly critical of the *Shelley* decision, writing that it was "impossible" to justify that decision through application of neutral principles. ("Neutral Principles" at 17.)

During his testimony, Judge Bork repeated his criticism of the *Shelley* decision, but sought to undercut the significance of that criticism by stating:

Shelley against Kraemer has never been applied again. It has had no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. It did what it did; it adopted a principle which the Court has never adopted again. And while I criticized the case at the time, it is not a case worth reconsidering. (Comm. Print Draft, Vol. 1, at 86.)

In fact, *Shelley* has been applied by the Supreme Court in many later decisions, including *Barrows v. Jackson*, 346 U.S. 249 (1953) (barring award of damages for breach of racially restrictive covenant); *Moose Lodge v. Irvis*, 407 U.S. 163, 171, 179 (1972); and *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984).

In light of Judge Bork's harsh criticism of *Shelley*, the committee entertains substantial doubt as to whether and how the nominee would apply that fundamental decision in future cases.

C. Judge Bork Has Rejected the Decision Banning School Segregation in Washington, D.C.

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954) the Supreme Court held that the Due Process Clause of the Fifth Amendment prohibited school segregation in the District of Columbia. In so doing, the Court ruled that the concept of "liberty" enshrined in the Due Process Clause contained a requirement that the federal government ensure that no person is no denied the equal protection of the laws.

During his testimony before the Committee, Judge Bork indicated that he thought that *Bolling* was wrongly decided, stating "I think that constitutionally that is a troublesome case . . . , " and "I have not thought of a rationale for it." (Comm. Print Draft, Vol. 1, at 262-63.) (Judge Bork, indicated, however, that he would never "dream of overruling" the decision. *Id.* at 264.)

Judge Bork's view that *Bolling* was wrongly decided leaves open to doubt whether he would ever hold that the federal government is prohibited from denying persons the "equal protection of the laws." It would appear from Judge Bork's criticism of *Bolling* that he Bork might well hold that there is no constitutional basis on which to challenge discrimination by the federal government.

D. Judge Bork Has Criticized the Poll Tax Decision

For many years, poll taxes were used to keep poor, largely minority, persons from exercising their fundamental right to vote. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1964), the Supreme Court struck down poll taxes, holding that:

[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying this or any other tax. (*Id.* at 666; footnote omitted.)

During his 1973 confirmation hearings, Judge Bork testified that "as an equal protection case, [*Harper*] seemed to me wrongly decided." (Solicitor General Hearings at 17.) When asked whether he thought *Harper* had contributed to the welfare of the nation, Judge Bork responded:

I do not really know about that. . . . As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other. (*Id.*)

Judge Bork then indicated that the constitutional issue "is a question of degree[,] [i]t depends on the size of the tax." (*Id.*) Judge Bork repeated his criticism of *Harper* in a 1985 essay. (See "Foreword" in G. McDowell, *The Constitution and Contemporary Theory* vii (1985).)

In his testimony before the committee, Judge Bork reiterated his view that the Supreme Court was wrong in the *Harper* case to hold that poll taxes are unconstitutional in the absence of an express showing of racial discrimination. (Comm. Print Draft, Vol. 1 at 128-29; 363, 430-31, 530-31.) Senator Heflin's colloquy with Judge Bork on this issue is informative:

Senator HEFLIN. Well, you know, I have looked back on a lot of decisions, but this poll tax . . . gives me concern. You basically . . . say that it was not discriminatory.

Judge BORK. There was no allegation of discrimination in that case.

Senator HEFLIN. There was no allegation? Is that the distinction you made? Because there is no question to me that a poll tax that required three years of history of payment, that the last payment had to be six months in advance, and you had to go to the courthouse to pay it was designed to prevent the poor and blacks from voting. I do not think there is any question that that is it.

Judge BORK. Senator, I did not discuss the case in those terms, and the Supreme Court did not discuss the case as one in which a poll tax that was designed to keep blacks from voting. (Comm. Print Draft, Vol. 1, at 431-32; emphasis added.)

And as Vilma Martinez testified: "Among the problems with Judge Bork's disagreement with *Harper* is the fact that the Supreme Court in its decision expressly recognized that the 'Virginia poll tax was born of a desire to disenfranchise the Negro.' *Harper*, 383

U.S. at 666 n.3." (Comm. Print Draft, Vol. 3, at 2157; see generally *id.* at 2157-59.)

Ms. Martinez also identified another problem with Judge Bork's criticism of *Harper*:

Even if the poll tax laws struck down in *Harper* and in . . . other cases had not been racially motivated, Judge Bork's criticism of *Harper* as being wrongly decided is worrisome for another reason, *i.e.*, that he believes that financial and property restrictions on the fundamental right to vote are perfectly consistent with his view of the equal protection clause. If so, Judge Bork disagrees with settled equal protection law holding that states may not restrict the fundamental right to vote to owners of real property. . . . (Comm. Print Draft, Vol. 3, at 2159; citations omitted.)

The committee strongly believes that in a democratic society, no person should be denied the fundamental right to vote because he or she is too poor to pay a poll tax. Judge Bork's criticism of the *Harper* decision striking down poll taxes reflects a pronounced lack of sensitivity to how the law affects real persons.

E. Judge Bork Has Criticized the One Person, One Vote Decisions

In a line cases extending from *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment requires that state and local legislative districts be apportioned in accordance with the one person, one vote principle. Judge Bork has been extremely critical of the Supreme Court's one man, one vote decisions, writing in 1968 that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine [they] imposed." ("The Supreme Court Needs A New Philosophy," at 166.) At his 1973 confirmation hearings, Judge Bork repeated this criticism, stating:

[O]ne man, one vote was too much of a straitjacket. I do not think there was a theoretical basis for it. (Solicitor General Hearings at 13.)

And in an interview on June 10, 1987, Judge Bork stated:

I think [the] Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause. That is not consistent with American political history, American political theory, with anything in the history or the structure or the language of the Constitution. (*Worldnet Interview*, United States Information Agency, June 10, 1987, Tr. at 22-23.)

Before the committee, Judge Bork adhered to these views quite vigorously, stating that "as an original matter, [the one man, one vote principle] does not come out of anything in the Constitution. . . ." (Comm. Print Draft, Vol. 1, at 136.)

As former Congresswoman Barbara Jordan so eloquently testified, the Supreme Court's one person, one vote decisions opened up the political process for millions of Americans whose votes had

been diluted by malapportioned legislatures. Representative Jordan described her experience as follows:

I filed for the election to the Texas House of Representatives. I ran. I lost. But I got 46,000 votes. I was undaunted. I said I will try again because my qualifications are what this community needs. So in 1964, I ran again . . . I lost. But I got 64,000 votes.

Why could I not win? I will tell you why. The Texas legislature was so malapportioned that just a handful of people were electing a majority of the legislature. I was trying to play by the rules, and the rules were not fair. But something happened. A decision was handed down: *Baker v. Carr*. That decision said this: The complainant's allegations of a denial of equal protection present a justiciable constitutional cause of action. The right asserted is within the judicial protection of the Fourteenth Amendment.

Following *Baker v. Carr*, a series of cases were decided. The Texas legislature was required, mandated by the Supreme Court to reapportion itself. It reapportioned. So in 1966, I ran again. The third time. This time, in one of those newly created State senatorial districts, I won. (Comm. Print Draft, Vol. 1, at 785-86.)

During his testimony, Judge Bork demonstrated a lack of understanding of the harm created by malapportioned legislatures. He suggested that "if the people of this country accept one man, one vote, that is fine. They can enact it any time they want to." (Comm. Print Draft, Vol. 1, at 131.) Once again, former Representative Jordan summarized the problem in compelling terms:

Now you know what Judge Bork would say. "Listen. I approve of the results of the reapportionment cases. I approve of the outcome in many of these cases, but my problem with the whole matter is that I don't like the reasoning which was used."

Well, let's look at that for the moment. A Borkian view. "Don't like the reasoning that was used. Approve of the outcome. What you really ought to do is let the democratically elected bodies make these decisions. That is the proper way to proceed."

Gentlemen, when I hear that, my eyes glaze over. If that were the case, I would right now be running my 11th unsuccessful race for the Texas House of Representatives. I cannot abide that. (Comm. Print Draft, Vol. 1, at 787; see also Martinez statement, Comm. Print Draft, Vol. 3, at 2161-62.)

The committee believes that the American people accept the one person, one vote principle as a fundamental component of constitutional equality. Judge Bork's persistent failure to accept this fundamental principle, we believe, demonstrates a deeply rooted hostility to the role of the courts in protecting individual rights and the integrity of the political process.

F. Judge Bork Has Criticized Decisions Upholding a Ban on Literacy Tests

Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions" of that Amendment. Invoking its authority under Section 5, the Congress in 1965 and 1970 adopted provisions of the Voting Rights Act banning literacy tests in certain instances. These provisions were upheld by the Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970). The Court held in those cases that Congress had the power to determine that requiring literacy tests in specific instances deprived voters of the equal protection of the laws, even though the Supreme Court had held in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), that such tests were not *per se* unconstitutional. The Supreme Court has relied on this reading of Section 5 to uphold a key provision of the Voting Rights Act. See *City of Rome v. United States*, 446 U.S. 156 (1980).

In prior testimony before this committee, Judge Bork has described *Katzenbach* and *Orgeon v. Mitchell* as "very bad, indeed pernicious, constitutional law." (Human Life Bill Hearings at 315; see also Solicitor General Hearings at 16) (describing *Katzenbach* as incorrect); Untitled Speech, Seventh Circuit (1981) at 5 (describing *Katzenbach* as "terrible law"). During the hearings on this nomination, Judge Bork adhered to his criticism of *Katzenbach*, describing it as "bad constitutional law." (Comm. Print Draft, Vol. 1, at 228, see also *Id.* at 323-26.)

Judge Bork testified that the ruling in *Katzenbach* is flawed because "the Constitution would be meaningless if Congress could alter it by a mere statute." If *Katzenbach* means this, it would, in Judge Bork's view, directly conflict with *Marbury v. Madison*, which enunciated the principle that the judiciary must "say what the law is." However, *Katzenbach* is itself an instance of the Supreme Court saying what the law is—in this case saying that Section 5 of the Fourteenth Amendment grants Congress the authority to implement the Fourteenth Amendment as it did. Senator Metzbaum and Professor Tribe discussed the question:

Senator METZENBAUM. Would you . . . tell us whether you agree with Judge Bork that *Katzenbach* is inconsistent with *Marbury v. Madison*?

Mr. TRIBE. Senator, I do not agree with Judge Bork . . . The basic question relates to the whole purpose of the Civil War Amendments. They were designed to secure equality and freedom, but they were designed by people who knew the courts could not perform the task alone.

That is why they contain enforcement provisions saying that Congress can enforce the provisions of these amendments, including the Fourteenth, by all reasonably necessary legislation.

That is exactly what Congress tried to do in a case like *Katzenbach v. Morgan*. . . . Now one can disagree with how wise that legislation. . . . But what I do not think you

can say in a credible way is that Congress was just ripping up and rewriting the Constitution.

The reason I would stress this is it does seem to me a bit strange that someone who is deferential to the will of the majority, someone who believes in letting majorities rule—as Judge Bork does—would be so activist as to strike down rational Congressional legislation enforcing the Fourteenth Amendment. (Comm. Print Draft, Vol. 2, at 54.)

The *Katzenbach* decision is susceptible of a number of interpretations—ranging from the “broad” view that the Congress has the power to interpret the Constitution to extend the scope of rights beyond that recognized by the Supreme Court, to the narrower view that Congress has the power to enact prophylactic rules to forbid practices that the Court would find violate the Constitution in particular instances. We need not choose from among these interpretations to be alarmed by Judge Bork’s exceedingly narrow reading of Congress’s authority under Section 5. Judge Bork’s views that the *Katzenbach* case was wrongly decided would severely restrict Congress’s authority under section 5 to enforce the Fourteenth Amendment.

* * * * *

Americans are rightly proud of the great strides our country has made in the past 40 years toward achieving our constitutional commitment to equal justice under law. The dramatic progress was eloquently described at the hearings by the Mayor of Atlanta, Andrew Young:

The success we enjoy—the cooperation between the races, the economic prosperity—has been built upon the foundation of civil rights and equal opportunity which the United States Supreme Court has fostered for three decades. Today, I can be Mayor of Atlanta. Yet just a few decades ago, as a college student, I could not stop for gas at many service stations, was told to use “separate” rest rooms and could not stay or be served in downtown hotels and restaurants. Just 25 years ago, black Americans were second-class citizens in the City of Atlanta. And white citizens were struggling with a stagnant economy.

But today, many people recognize our city as “the city too busy to hate.” We are a city busy providing jobs, developing and protecting the environment, expanding our economy, educating our youth and opening the doors of opportunity for all our citizens. (Statement of Mayor Andrew Young, Comm. Print Draft, Vol. 1, at 813.)

After reviewing the totality of Judge Bork’s record on civil rights, former Secretary of Transportation William T. Coleman, Jr. summarized the nominee’s views as follows:

At almost every critical turning point in the civil rights movement as exemplified in these cases, Judge Bork has, as a public speaker and scholar, turned the wrong way. (Coleman statement, at 26-7.)

Similarly, Professor Burke Marshall, who served as Assistant Attorney General in charge of the Civil Rights Division from 1961-1965, expressed grave concern about the totality of Judge Bork's views on the Supreme Court's landmark civil rights cases:

[I]t is not my purpose to criticize Judge Bork for his views about any single one of these decisions. No doubt there is something to his views in each case, considered separately. No doubt there is indeed some arguably valid ground on which any Supreme Court decision can be described as incompletely or wrongly reasoned. The real concern is with the tenor, the tone and the substance of Judge Bork's discussion of these matters. It seems to show no awareness, no understanding of the enormity and the scope of the system of racial injustice that was implemented by law in this country. And that insensitivity has to do importantly with what is wrong, both historically and in terms of constitutional purpose, with Judge Bork's ungenerous concept of the role of the federal judiciary, and especially the Supreme Court, under the equal protection clause and the other provisions of the Civil War Amendments. It was the judiciary, followed by the executive, and followed again by the Congress, with its action in turn legitimated and fortified by the judiciary that enabled this nation finally to confront and to resolve under law the terrible burdens of racial oppression. . . . Judge Bork's reaction to racial issues, and his whole concept of the constitutional role of the judiciary, would have stifled rather than supported the accomplishments of the period. (Marshall statement, Comm. Print Draft, Vol. 1, at 842.)

In short, Judge Bork has consistently criticized legislation and Supreme Court decisions advancing civil rights for all Americans.

To be sure, Judge Bork was not the only opponent of the Civil Rights Act of 1964, and some of the decisions he criticized were not unanimous. But Judge Bork's criticism of and opposition to the broad number and variety of civil rights achievements discloses a troubling pattern. In the committee's view, this persistent pattern of criticism of civil rights advances, coupled with a conspicuous failure to suggest alternative methods for achieving these critical objectives, reflects a certain hostility on Judge Bork's part to the role of the courts in ensuring our civil rights. The committee's reaction to Judge Bork's long record of criticism of the country's achievements in the field of civil rights was exemplified by Senator Kennedy's comment to Judge Bork:

With all your ability, I just wish you had devoted a little of your talent to advancing . . . equal rights rather than criticizing so many of the decisions protecting rights and liberties. Lawyers can always make technical points, but [a] justice ought to be fair. (Comm. Print Draft, Vol. 1, at 132.)

In light of Judge Bork's demonstrated hostility to the fundamental role of the courts in protecting civil rights, the committee strongly believes that confirming Judge Bork would create an un-

acceptable risk that as a Supreme Court Justice, he would reopen debate on the country's proudest achievements in the area of civil rights and return our country to more troubled times.

III. THE EQUAL PROTECTION CLAUSE AND GENDER DISCRIMINATION

The words of the Equal Protection Clause are grand but general: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." One of the more troubling aspects of Judge Bork's philosophy of equality under the Constitution is his application of the general language of the Clause to discrimination on the basis of gender.

The committee explored two principal questions with Judge Bork on this issue. First, does he believe that the Equal Protection Clause applies to women? Second, by what standard should a court evaluate a challenge to a law that discriminates between men and women? The committee finds that Judge Bork's philosophy—as expressed both before and during the hearings—raises very serious concerns.

A. Prior to the Hearings, Judge Bork Did Not Include Women Within the Coverage of the Equal Protection Clause

Prior to the hearings, Judge Bork engaged in a sustained critique of applying the Equal Protection Clause to women. He argued that to extend the Clause to women departs from the original intent of the Fourteenth Amendment, produces unprincipled and subjective decision-making and involves the courts in "enormously sensitive" and "highly political" matters.

In 1971, for example, then-Professor Bork said that "cases of race discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the . . . equal protection clause" and that "[t]he Supreme Court has no principled way of saying which non-racial inequalities are impermissible." ("Neutral Principles" at 17, 11.)

Judge Bork reiterated that position more than 10 years later, after ascending to the bench:

We know that, historically, the Fourteenth Amendment was meant to protect former slaves. It has been applied to other racial and ethnic groups and to religious groups. So far, it is possible for a judge to minimize subjectivity.

But when we abandon history and a very tight analogy to race, as we have, the possibility of principled judging ceases. (Untitled Speech, *Catholic University*, March 31, 1982. at . 18-19.)

In this same speech, Judge Bork insisted that the courts were not competent to decide which legislative attitudes toward women were legitimate judgments, and which were outmoded stereotypes:

There being no criteria available to the court, the identification of favored minorities will proceed according to **current fads in sentimentality**. . . . This involves the judge in deciding which motives for legislation are respectable and

which are not, a denial of the majority's right to choose its own rationales. (*Id.* at 18., emphasis added.)

One month later, he repeated this objection again, complaining about the "extension of the Equal Protection Clause to groups . . . that were historically not intended to be protected by that clause." ("Federalism and Gentrification," *Yale Federalist Society*, April 24, 1982, at 9.)

As recently as June 10, 1987, less than a month before his nomination, Judge Bork reiterated his view:

I do think the Equal Protection Clause **probably should have been kept to things like race and ethnicity.** . . . When the Supreme Court decided that having different drinking ages for young men and women violated the equal protection clause [in *Craig v. Boren*, 429 U.S. 190 (1976)], I thought that was . . . **to trivialize the Constitution** and to spread it to areas it did not address. (*Worldnet Interview*, June 10, 1987, at 12; emphasis added.)

B. Judge Bork's Testimony at the Hearings Was His First Publicly Expressed Approval of Including Women Within the Scope of the Equal Protection Clause

During his testimony, Judge Bork publicly stated for the first time that he now believes that the Equal Protection Clause should be extended beyond race and ethnicity, and should apply to classifications based on gender. According to Judge Bork, "[e]verybody is covered—men, women, everybody." (Comm. Print Draft, Vol. 1, at 230.) Judge Bork explained that all forms of governmental classifications were unconstitutional unless they had a "reasonable basis." (See, e.g., Comm. Print Draft, Vol. 1, at 135, 230, 231, 306, 309.) He also said that he would reach the same results that the Supreme Court had reached in virtually all of its recent sex discrimination cases. (See e.g., Comm. Print Draft, Vol. 1, at 306; 309.) Finally, Judge Bork testified that his standard was the same as that utilized by Justice Stevens.

Judge Bork's rationale for his change in position was that the Equal Protection Clause should be interpreted according to evolving standards and social mores about the role of women:

As the culture changes and as the position of women in society changes, those distinctions which seemed reasonable now seemed outmoded stereotypes and they seem unreasonable and they get struck down. That is the way a reasonable basis test should be applied. (Comm. Print Draft, Vol. 1, at 135.)

C. Judge Bork's "Reasonable Basis" Standard Does Not Provide Women with Adequate Protection and Is Not the Standard Used by Justice Stevens

A comparison of Judge Bork's pre-hearing views and his hearing testimony is striking. Putting aside the apparent change in views, his position that the Equal Protection Clause covers women does not go to the heart of the debate over the Court's role in reducing gender discrimination. The central debate concerns the **standard** of

equal protection that should apply in such cases. Importantly, that standard is a presumptive guide to courts to use in evaluating claims of gender-based discrimination. The pertinent question is thus whether Judge Bork's currently expressed position would adequately protect women from such discrimination. For several reasons, the committee believes that it would not.⁷

1. The "Reasonable Basis" Test Has Previously Been Used to Uphold Discriminatory Legislative Classifications

Prior to the 1970s, the Supreme Court used a "reasonableness" concept to uphold a variety of legislative classifications based on gender. As Professor Sylvia Law testified: "Reasonable basis has been a standard that has upheld state power to draw lines, to discriminate if you will, if any state of facts can reasonably be conceived that would sustain the law." (Comm. Print Draft, Vol. 2, at 938.)

In 1873, for example, the Supreme Court found it reasonable to exclude women from the practice of law. (*Bradwell v. Illinois*, 83 U.S. 130, 140-42 (1873).) In 1924, the Court found no "unreasonable . . . classification" in a law that excluded women, "considering their more delicate organism," from late-evening restaurant employment. (*Radice v. New York*, 264 U.S. 293, 294, 296 (1924).) And in 1961, a unanimous Supreme Court found a state's exemption of women from jury service (unless they volunteered) to be based on a "reasonable classification" in light of how, "[d]espite [their] enlightened emancipation," women are "still . . . the center of home and family life." (*Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961).) Thus, under a reasonableness standard, the Court upheld state laws reflecting a level of blatant discrimination that is offensive to the ideals of equality that we as a society hold today.

As Professor Sylvia Law concluded:

[I]n Supreme Court jurisprudence of the past 100 years, reasonable basis has been a standard that has upheld state power to draw lines, to discriminate, if you will, if any state of facts can reasonably be conceived that would sustain the law. . . . Since 1971, the Supreme Court has refused to apply that deferential reasonable basis standard to laws that discriminate on the basis of sex. The Court has made this charge because it recognized that women and other groups have historically been subject to irrational prejudice. Law affecting such groups must be scrutinized carefully. (Testimony of Sylvia Law, Comm. Print Draft, Vol. 2, at 938.)

⁷ Carla Hills, former Secretary of the Department of Housing and Development, testifying on Judge Bork's behalf, concluded that Judge Bork is "likely to be a strong supporter of women's rights" and that his view on gender discrimination is "similar to that of many feminists such as Herma Hill Kay, Lucinda Findley, and Mary Becker." (Comm. Print Draft, Vol. 2, at 100.) After that testimony, each of the scholars mentioned contacted the committee in writing or testified, and flatly denied that there was any similarity. (Comm. Print Draft, Vol. 3, at 1545; id at 1645-46)

2. Judge Bork's Willingness to Defer to Statistically-Based Generalizations Demonstrates the Weakness of His Standard

Judge Bork's testimony on the Court's decision in *Craig v. Boren*, 429 U.S. 190 (1976), provides particular insight into the weakness of his standard. In *Craig*, the Court struck down an Oklahoma statute that allowed women to obtain beer at age 18 but did not allow men to do so until they were 21. During his testimony, Judge Bork explained why he thought that the classification would be upheld using a reasonable basis test: The law, he said, "[p]robably is justified because they have statistics. . . . [T]hey had evidence that there was a problem with young men drinking more than there was with young women drinking." (Comm. Print Draft, Vol. 1, at 369., emphasis added.) According to Judge Bork, therefore, sex-based treatment should have been allowed because it rested upon a generalization supported by statistics.

Several witnesses testified about the serious problems associated with relying on statistical generalizations. Professor Dellinger stated that "[i]f you allow statistical generalizations to determine the fate of individuals . . . you have made a major inroad undercutting the protection of women against discrimination." (Comm. Print Draft, Vol. 2, at 743.) He explained:

Take, for example, a case in which an employer finds that women with preschool-aged children statistically . . . have more employment-related problems than men with preschool-aged children. . . . The approach that Judge Bork is suggesting would allow the Court to sustain discriminating against an individual woman applicant . . . because you have aggregate group statistics, generalizations about women. And I think that could be very damaging. (*Id.*)

In Professor Gewirtz's view, Judge Bork's test "focusses on the accuracy of a statistical generalization about men and women, not whether the generalization is true for individual men and women." (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1193; emphasis in original.) Furthermore,

"[r]easonable basis," as Judge Bork seems to understand it, allows a sex classification based on group averages, and ignores the unfairness to individual women who don't fit the generalization but who are lumped together with others of their sex. Judge Bork's standard is not sensitive to the essence of discrimination—making distinctions between people based on group generalizations that are not accurate as applied to them individually. (Comm. Print Draft, Vol. 2, at 1193-94; see also testimony of Professor Wendy Williams, at 7.)

3. Despite Judge Bork's Attempt to Equate His Standard With That of Justice Stevens, the Two Are Markedly Different

The difference between the standards utilized by Judge Bork and Justice Stevens is illustrated by the varied approaches taken by each to *Craig v. Boren*. Concurring in *Craig*, Justice Stevens agreed

with the majority that the Oklahoma law should be struck down. As explained by Professor Williams, Justice Stevens rejects the use of statistical generalizations:

Where Judge Bork saw a ten-fold difference in drunk driving arrests between young men and young women—2 percent of the men but only .18 percent of the women were arrested—Justice Stevens sees the 98 percent of young men and 99.2 percent of young women—the vast majority of both sexes—who do not show up in the statistics. To him, it was sex discrimination to hold all young men between 18 and 21 accountable for the driving sins of two percent of them. (Williams testimony, Comm. Print Draft, Vol. 2, at 958) *see also* Dellinger Testimony, Comm. Print Draft, Vol. 2, at 743–44.)

The “vast gulf between the jurisprudence of Justice Stevens and the new theory of Judge Bork,” (Law Testimony, Comm. Print Draft, Vol. 2, at 939), runs even deeper than their differences in *Craig*. Justice Stevens has in fact joined numerous opinions clearly establishing heightened judicial scrutiny in cases of alleged sex discrimination, requiring that any legal discrimination between men and women be closely “tailored to further an important governmental interest,” and not simply that it be “reasonable.” (*Kirchberg v. Feenstra*, 450 U.S. 455, 460 (1980).) Importantly, Justice Stevens agreed with Justice O'Connor in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724–25 (1982), in which the Court, striking down gender discrimination in medical schools, held that significantly heightened scrutiny is vital in all gender cases.

Furthermore, while Justice Steven has used the phrase “rational basis” periodically in discussing equal protection, it is clear that his approach is not the same as that proffered by Judge Bork during the hearings. Justice Stevens has described what he means by “rational basis” in this way:

The term “rational” . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate purpose that transcends the harm to the members of the disadvantaged class. Thus, the word “rational”—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially. (*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring).)

In fact, Justice Stevens builds into his standard an even more demanding requirement: He asks not simply whether an “impartial lawmaker” would view the law as rational, but also whether “a member of [the] class of persons” disadvantaged by the challenged law, would so view it. (*Id.*)

Justice Stevens's notion of “rational basis,” thus, “is obviously very different from simply asking whether the government has the ‘statistics’ to justify the accuracy of a generalization.” (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1194; footnote omitted.)

4. Judge Bork's "Reasonable Basis" Test Cannot Be Explained in Terms that Are Consistent with His Original Intent Framework and Is Contrary to His Own Guidelines for Judicial Decision-Making

The standard articulated by Judge Bork during his testimony seems unmoored from his basic methodology. "[N]othing about . . . [Judge Bork's standard] can be explained in terms of the text of the document [the Constitution] or the 'original intent' of the Framers of ratifiers of the Fourteenth Amendment, from which Judge Bork would derive his warrant as an enforcer of the Constitution." (Tribe statement, Comm. Print Draft, Vol. 2 at 28.) And as Professor Gewirtz asks rhetorically: "How can an 'originalist' who believes that the 14th Amendment was not intended to embody a principle concerning sex equality find a warrant to displace a legislature's use of sex classifications?" (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1195.)

Furthermore, Judge Bork's "reasonable basis" test seems to be at odds with his own decision-making framework, which seeks to minimize a judge's subjective preferences and values. "It is hard to imagine a more vague and unpredictable standard than asking whether there is a 'reasonable basis' for a law." (Gewirtz statement, Comm. Print Draft, Vol. 2, at 1195.) Accordingly, Judge Bork's standard appears to invite precisely the kind of unstructured decision-making that his writings of many years argue against.

* * * * *

Prior to the hearings, Judge Bork said on several occasions—most recently, less than one month before his nomination—that the Equal Protection Clause of the Fourteenth Amendment should not be applied to women. At the hearings, Judge Bork announced for the first time that he would apply the Clause to women pursuant to a "reasonable basis" standard. The Committee agrees with Senator Specter's statement that there is

substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless specified or are within original intent. (Statement of Senator Specter, October 1, 1987, Cong. Record, S 13318.)

And as Professor Williams, focusing on Judge Bork's standard of review, concluded:

Judge Bork's view on women's equality under the Constitution makes his nomination for a position on the highest court in the land a matter of deep uneasiness for persons concerned with the equality of the sexes. (Williams testimony, Comm. Print Draft, Vol. 2, at 956.)

IV. FIRST AMENDMENT

In 1971, while a Professor at Yale Law School, Judge Bork wrote his now famous *Indiana Law Journal* article entitled "Neutral Principles and Some First Amendment Problems." In his analysis

of the First Amendment, Judge Bork reached the following rather striking conclusion:

Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other forum of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, these should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation or the violation of any law. ("Neutral Principles" at 20.)

The committee explored each of the First Amendment issues raised by this statement and the manner in which Judge Bork has modified his First Amendment views.

A. Dissident Political Speech

1. Prior to the Hearings, Judge Bork Flatly Rejected the Holmes and Brandeis "Clear and Present Danger" Test and the Supreme Court's Formulation of that Test in *Brandenburg v. Ohio*

During World War I and the Red Scare period that followed, the Supreme Court began to consider the conditions under which political speech that calls for law-breaking or violence could be prohibited. Although a majority of the Court at that time held that such speech could be suppressed even though there was no immediate threat of law-breaking or violence, (see *Abrams v. United States*, 250 U.S. 616 (1919) and *Gitlow v. New York*, 268 U.S. 652 (1925)), Justices Holmes and Brandeis wrote stirring and historic dissents.

Their dissenting view—that the Constitution allows political speech to be stopped only when there is a "clear and present danger" of violence or law-breaking—began to be adopted by the Supreme Court in the 1950s, and a similar but somewhat more stringent test eventually was accepted by a unanimous Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court held in *Brandenburg* that speech calling for violence or law-breaking could be forbidden only if such speech called for, and would probably produce, "imminent lawless action." This standard, therefore, addresses the nature of the speech itself and the chance that, realistically, it will lead to any harm under the circumstances in which it was uttered. Prior to the hearings, Judge Bork made three separate attacks on the *Brandenburg* decision and its underlying doctrine.

First, in his 1971 *Indiana Law Journal* article, then-Professor Bork removed from the protection of the First Amendment "any speech advocating the violation of law," even if it presents no danger of violence or law-breaking. ("Neutral Principles" at 31.)

Second, in a 1979 speech at the University of Michigan, he repeated that view and called *Brandenburg* a "fundamentally wrong interpretation of the First Amendment." (Michigan Speech at 21.) And he found that the Supreme Court's rule in *Brandenburg* did in fact come from the "clear and present danger" test: "The Holmes-Brandeis position . . . was imposed upon the First Amendment in

the last year of the Warren Court in *Brandenburg v. Ohio*." (*Id.* at 20-21.)

Third, in a speech delivered to the Judge Advocate General's School two years after he became a judge, the nominee expressed his continuing displeasure with *Brandenburg*, which he defined as holding that "catatonic sentiments . . . could not be inhibited or punished in any way." ("The Constitution and the Armed Forces," *Judge Advocate's General School*, May 4, 1984, at 5-6.)

In his last pre-hearing statement on this issue, Judge Bork seemed to moderate his criticism of Supreme Court cases. He said in an interview with *Newsweek* after his nomination that Supreme Court rulings leave speech advocating law violation "quite clearly now . . . protected." (*Newsweek*, Sept. 14, 1987 at 33.) Judge Bork did not say that he approved of such rulings.

2. During the Hearings, Judge Bork First Said that He Agreed with *Brandenburg*, and Then that He Still Disagreed with It but Would Accept the Precedent as "Settled Law"

Judge Bork actually took two distinct positions at the hearings on advocacy of law-breaking, both of which were different from his previous position. The first time the issue arose, he stated that "the Supreme Court has come to the *Brandenburg* position—which is okay. . . . That is a good test." (Comm. Print Draft, Vol. 1, at 247.) And in answer to Senator Leahy's question, "At one point, you felt the *Brandenburg* case was a fundamentally wrong interpretation of the First Amendment. Today you feel it is right," Judge Bork answered, "It is right" and "the First Amendment also says that we will take that chance [that violence might occur]." (Comm. Print Draft, Vol. 1, at 249, 252.)

The next day, his answers were different. He told Senator Specter, "[o]n *Brandenburg*, I did not say my mind had changed. . . . I think *Brandenburg* may have gone too—went too far, but I accept *Brandenburg* as a judge and I have no desire to overturn it." (Comm. Print Draft, Vol. 1, at 409.) And immediately after he said: "It's settled law. That's all I've said. I haven't said that these writings [that is, his earlier criticisms of *Brandenburg*] were wrong." (*Id.*) Judge Bork reiterated this view for the remainder of his testimony.

In addition, in his testimony Judge Bork reiterated a distinction that he had suggested for the first time in an interview published immediately before the hearings (*U.S. News and World Report*, Sept. 14, 1987 at 22): "It seems to me that if the attempt [to advocate law violation] is by a person or a group to challenge the constitutionality of a law, then I do not see how it can be made illegal to advocate that attempt." (Comm. Print Draft, Vol. 1, at 247.) There are a number of problems with this exception.

First, until September 1987, Judge Bork had never made a distinction (in his 1971 article, or in his 1979 and 1984 speeches) between advocacy of testing the constitutionality of a law and subversive advocacy. Both were, without exception, termed "advocacy of law violation." And Judge Bork's rationale for this conclusion—that the "process of 'discovery and spread of political truth' is damaged or destroyed if the outcome is defeated by a minority that

makes law enforcement . . . impossible or less effective" ("Neutral Principles" at 31; *see also Michigan Speech* at 21)—applies equally to both types of advocacy.

Second, the exception is fraught with uncertainty. In answer to Senator Leahy's question, "What if they advocated the violation of a law to test its constitutionality and the constitutionality was upheld?", Judge Bork responded that "I really do not know how that would come out." (Comm. Print Draft, Vol. 1, at 247.) Such uncertainty means that the outcome of such a case would hinge not on the potentially criminal act itself but on an entirely independent constitutional determination.

Finally, Judge Bork's "test of constitutionality" exception is of more academic interest than real-world use. Dr. Martin Luther King, for example, did not advocate illegal sit-ins and other forms of civil disobedience in order to stimulate court tests. He advocated them to prick the conscience of the nation—to dramatize the injustice of segregation laws that were immoral but not necessarily unconstitutional. (See Young statement, Comm. Print Draft, Vol. 1, at 819-20.) In sum, Judge Bork's newly formulated exception is not simply new and uncertain, but is also a technical distinction with little concrete application.

3. Judge Bork's Changing Positions on *Brandenburg* Indicate that He Might Not Fully Apply this Vital Precedent

A major concern voiced by several members of the committee (particular by Senator Specter)—and voiced generally about those issues that Judge Bork accepted as "settled law"—was how he would apply doctrines of which he expressly disapproved in new cases with new facts. The committee finds several reasons for concern.

First, notwithstanding his acceptance at the hearings of the *Brandenburg* decision, Judge Bork was steadfast in his refusal to accept the "clear and present danger" doctrine on which *Brandenburg* was based. Senator Specter commented that this

just seems surprising to me, that in the context where you characterize ["the clear and present danger"] doctrine as "fundamentally wrong" and attack the rationale as "frivolous," that you can, at the same time, say that you now accept the current Supreme Court interpretation. (Comm. Print Draft, Vol. 1, at 255.)

In subsequent testimony, Professor Marshall suggested how a judge could "accept" precedents while virtually restricting the application of such precedents to their original facts:

[T]o say he accepts *Brandenburg* as precedent and at the same time denies the historic purpose of *Brandenburg* is an ambiguous position without quarelling. . . . And [in Judge Bork's view,] what is [*Brandenburg*] a precedent for is the question? It is the precedent for the fact that a statute, written as that Ohio statute was, which was based on the [criminal] syndicalism [law] that was declared constitu-

tional in *Gitlow* is no longer constitutional. (Comm. Print Draft, Vol. 1, at 832, 833.)

Second, Judge Bork stated that he saw *Cohen v. California*, 403 U.S. 15 (1971), and *Hess v. Indiana*, 414 U.S. 105 (1973), as obscenity cases because vulgar words were included in the political speech at issue in each. (Committee Print Draft, Vol. 1, at 251, 411.) In contrast, no member of the Court in either case (and *Cohen* was a unanimous decision) thought the vulgarity of the speech was in any way relevant to whether or not it was protected, and both decisions directly applied the rule of *Brandenburg*.

Professor Tribe described the ramifications of Judge Bork's characterization of these cases. It is not, Professor Tribe stated,

even clear just what Judge Bork means by his "full acceptance of the Supreme Court's First Amendment jurisprudence," since **his own description** of that jurisprudence, as it presently stands, differs sharply from what virtually all commentators with whom I am familiar understand that jurisprudence to be. . . . If Judge Bork's version of the First Amendment, as he expressly affirms that he "accepts" it during these hearings, permits government to punish **even political speech**—which Judge Bork concedes lies at the First Amendment's core—whenever the speaker uses a single word that the government, or the local majority, deems vulgar or offensive, then the nominee's "full acceptance of the Supreme Court's First Amendment jurisprudence" cannot provide much solace to those who have read his many writings on the subject and come away fearful for this most basic of our freedoms. (Tribe testimony, Comm. Print Draft, Vol. 2, at 33-34; emphasis in original.)

Thus, there is great concern that in new cases, Judge Bork would find reasons not to apply the rules from decisions he dislikes but says are too "settled" to overturn completely. In other words, while he might not try to reverse those decisions, he could find them irrelevant or apply them in such a narrow way that their importance and effect would be greatly diminished.

Political dissidents who make statements that flirt with the edges of the law rarely make very appealing parties in a lawsuit. It is for precisely that reason that the basic values of our political system are seriously threatened in cases that involve the sometimes incendiary and generally unpopular speech of such dissidents. Our system is built upon the precept that any political speech, short of that which will produce imminent violence, furthers public understanding and national progress—sometimes, by showing the virtues of the existing system.

And sometimes dissident speech becomes the precursor of political change and ultimately, a new national consensus. Constitutional scholar Alpheus T. Mason offers a functional argument for great breadth in freedom of speech and related rights:

Without equal opportunity to utilize the crucial preliminaries—speech, press, assembly, petition—the idea of government by consent of the governed becomes an empty declamation. Majorities . . . are in flux. Tomorrow's ma-

jority may have a different composition as well as different goals. Defense of the political rights of minorities thus becomes, not the antithesis of majority rule, but its very foundation. The majority must leave open the political channels by which it can be replaced when no longer able to command popular support. (*The Supreme Court: Palladium of Freedom* (University of Michigan Press, 1963) at 177-178.)

And Justice Oliver Wendell Holmes's classic dissent in *Abrams v. U.S.*—as noted, a position adopted years ago by the Supreme Court—provides the most expressive and stirring statement of the values at stake:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. (*Abrams v. United States*, 250 U.S. 616, 630 (1919).)

B. While Judge Bork's Testimony About First Amendment Protection for Art, Literature and Expressive Speech Was Somewhat Reassuring, it Nonetheless Must Be Read Against the Background of His Prior Statements

1. Prior to the Hearings, Judge Bork's Views Left a Broad Area of First Amendment Expression Unprotected

In his 1971 *Indiana Law Journal* article, then-Professor Bork argued that the First Amendment only protected explicitly political speech. Judges should never intervene, he said, to "protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." ("Neutral Principles" at 20.) Judge Bork publicly recanted that view in his 1973 Solicitor General confirmation hearings, and indicated that he believed the First Amendment should have a somewhat broader scope.

In subsequent speeches and interviews, Judge Bork made clear that he no longer believed speech had to be clearly political to be protected by the First Amendment. Instead, he said that speech must be related to and "directly feed" the political process. For example, after identifying political speech as the core of the First Amendment, Judge Bork stated in a 1979 speech:

But there is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but

are not on that account immune from regulation. (*Michigan Speech* at 8-9.)

In a 1985 interview, Judge Bork reaffirmed his view that certain wholly non-political, non-obscene expression was not protected by the First Amendment:

I was arguing with . . . Harry Kalven about that, who said that you had to start from political speech and move on to literature until you get all the way out to paintings, statues, dancing and so forth—anything that's expressive is protected. That seems to me to be a level of generality which goes well beyond what the Framers intended. I doubt if they intended to protect some forms of dancing from regulation. ("Justice Robert H. Bork: Judicial Restraint Personified," *California Lawyer*, (May 1985) at 26.)

On several occasions prior to the Hearings, Judge Bork publicly backed away from his 1971 article (though not from the 1979 speech or 1985 interview). In a 1984 letter, he indicated that he would extend First Amendment protection to "many other forms of discourse, such as moral and scientific debate." (*American Bar Association Journal*, January 1984.) In 1987, he further extended this view to include fiction. (*Worldnet Interview* at 25.) In both cases, he indicated that the First Amendment extended to these areas of expression because they had some "relation to those [political] processes."

Prior to the hearings, Judge Bork never indicated that he would apply First Amendment protection to purely expressive, wholly non-political, non-obscene speech such as most paintings, statues, or dancing. In his last direct comments on this issue, in 1985, he stated directly that he disagreed with those who would extend First Amendment protection to those forms of expression.

Accordingly, under Judge Bork's views prior to the hearings, a broad area of expression traditionally viewed as included within the scope of the First Amendment would be unprotected. A Rubens painting could not be hung in a museum if the city council chose to prohibit it. The same would be true of a ban on performances by the Alvin Ailey Dance Troupe.

2. During the Hearings, Judge Bork Drew Back Substantially from His Prior Remarks

At the hearings, Judge Bork drew back substantially from his 1985 remarks. He explained that "if I was starting over again, I might sit down and draw a line that did not cover some things that are now covered," (Comm. Print Draft, Vol. 1, at 303.) but stated that he would "gladly" accept the Supreme Court's First Amendment decisions protecting non-political expression. Referring to the well-established principle that speech is protected regardless of its lack of relationship to the political process, Judge Bork said: "That is what the law is, and I accept that law." (Comm. Print Draft, Vol. 1, at 402.)

* * * * *

The committee finds that Judge Bork's testimony was somewhat reassuring on the question of First Amendment protection for non-

political speech. While his testimony was welcome, however, it "still must be read," in Senator Leahy's words, "against the background of Judge Bork's prior statements on the issue." (Statement on the Confirmation of Judge Robert Bork, Cong. Record, September 30, 1987, S 13128, S 13130.) As Senator Leahy concluded:

Judge Bork may have long ago abandoned the "bright line" distinction between protected political and unprotected non-political speech, but his responses to interviewers as recently as this past May and June clearly state that the existence of First Amendment protection should be affected by where speech falls in relation to a "wavering line" between speech that feeds into the "way we govern ourselves" and speech that does not, a line that must be drawn on a "case by case basis."

When he came before the Judiciary Committee, Judge Bork conceded that this line, whether bright or "wavering," is irrelevant to the scope of the First Amendment. By his confirmation testimony, Judge Bork accepted a consensus that has existed for decades. (*Id.* at S 13130.)

V. EXECUTIVE POWER

The Framers clearly recognized that unchecked power in the Executive Branch represents the greatest threat to individual liberty. The genius of the Constitution is perhaps most apparent in the separation of powers among the branches of government and in the system of checks and balances, carefully designed to ensure that no single branch would possess unlimited authority in any area.

In extensive writings and congressional testimony over the course of his professional career, Judge Bork has expressed a broad, almost limitless, view of presidential power, particularly with respect to the conduct of foreign affairs, and a correspondingly narrow view of Congress's ability to restrict abuses of that power. The committee believes that, when viewed as a whole, Judge Bork's views on the scope of executive power place him well outside of the mainstream of legal thought, and run directly contrary to the limits on executive power intended by the Framers.

A. Judge Bork Has a Restricted View of Congress's War Powers

The War Powers Act places certain limitations on the President's authority to send and maintain American military forces in hostile circumstances without congressional approval. In an article in the *Wall Street Journal*, Judge Bork stated that the War Powers Act "is probably unconstitutional and certainly unworkable." ("Reforming Foreign Intelligence," March 9, 1978, at 24.) During his appearance before the committee, Judge Bork adhered to this view, suggesting that both the Act's legislative veto provision, (Comm. Print Draft, Vol. 1, at 313, 697), and its provisions limiting the time during which troops may be introduced into a hostile situation without congressional approval, may be unconstitutional. (*Id.* at 697-698.)

The committee is well aware that as Commander-in-Chief, the President must have sufficient authority to pursue strategic objectives, free from "micro-management" of tactical decisions by the

Congress. But the Constitution makes abundantly clear that the power to declare war, and to define and limit the scope of a war, are reposed in the Congress. As University of Chicago Professor Cass Sunstein testified:

The constitutional issue is not a simple one, and Judge Bork is correct in pointing to the President's power to make tactical decisions during a war. The Constitution, does, however, vest in the Congress the power "to declare war," and there is little in the history of the Constitution or the intent of the framers to forbid congressional controls of the sort involved in the War Powers Resolution. The Resolution does not in fact lead to "micro-management." Its purpose and effect are to ensure that Congress, rather than the President, decides whether the nation is to be at war. (Statement of Cass Sunstein, Comm. Print Draft, Vol. 3, at 1334.)

Judge Bork has also taken the position that when the United States is engaged in an undeclared conflict against one nation, Congress cannot constitutionally prohibit a President from expanding that conflict by commencing hostilities against another country. In a 1971 comment in the *American Journal of International Law*, Judge Bork wrote:

I think there is no reason to doubt that President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by the North Vietnamese and Viet Cong forces. That authority arises both from the inherent powers of the President and from Congressional authorization. **The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon the powers the Constitution reposes exclusively in the President.** (65 Am. J. Int'l L. 79 (1971); emphasis added.)

Here again, Judge Bork manifests an exceedingly broad view of presidential power. As Professor Sunstein stated:

Judge Bork's view appears to be that once a war has been authorized, the President has the inherent power to extend its reach if necessary, even though the judgment is inconsistent with the congressional declaration. In some circumstances, Judge Bork's position is probably correct; tactical judgments may enable the President to extend a war into other nations. But his broad and unqualified statements are somewhat disturbing. (Sunstein statement, Comm. Print Draft, Vol. 3, at 1330.)

Judge Bork's suggestion that the President has the inherent power to ignore such limitations is profoundly troubling. As former Senator Thomas F. Eagleton, an expert on Congress's powers with respect to war, testified:

Judge Bork, with all of his purported adherence to "original intent," forgets that the Founding Fathers deliberately decided that matters relating to war and the use of American military forces are *shared* powers. . . . The Constitution gives Congress a grave responsibility in determining where and how American forces are to be deployed under threat of hostile action. . . . Judge Bork says: No, its all up to the President. I urge Judge Bork to read Article I, Section 8 of the Constitution, including the clauses, "Congress shall have Power . . . to declare War . . . and to make Rules for the Government and Regulation of the land and naval Forces." (Eagleton statement, Comm. Print Draft, Vol. 3, at 1308.)

B. Judge Bork Has a Narrow View of Congress's Power to Limit Intelligence Activities

Judge Bork has expressed an exceedingly narrow view of Congress's right to participate in or restrict intelligence activities, even when such activities are conducted in the United States against U.S. residents.

The Foreign Intelligence Surveillance Act generally requires the Executive Branch to obtain an order from a special court before electronic surveillance can be conducted in the United States against U.S. residents suspected of foreign intelligence activities. The Act was drafted under the supervision of former Attorney General Edward Levi, and it was passed by a vote of 95-1 with the overwhelming support of the intelligence community.

At hearings in 1978 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, Judge Bork testified—in direct contrast to the position of Attorney General Levi, under whom he served as Solicitor General—that he believed the legislation was unconstitutional:

The plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well. . . . The law is very probably a violation of both Articles II and III of the Constitution. ("Foreign Intelligence Surveillance Act," Hearing, 95th Congress, 2nd Sess. (1978), at 130-131.)

With respect to Article II, Judge Bork stated that "Congress's constitutional role is largely confined to the major issues. . . . Congress . . . may not dictate the President's tactics in an area where he legitimately leads." (*Id.* at 132.) He stated that the legislation violated this principle, "by prescribing numerous details of the conduct of foreign surveillance, imposing the warrant requirement . . . and forcing upon the President the wholly inapposite requirement that a federal criminal law be about to be violated before he may defend the nation's interests." (*Id.*)

With respect to Article III, Judge Bork indicated that there would be no "case or controversy" in the warrant proceedings and that the use of Article III cases in such proceedings would therefore be unconstitutional. ("Reforming Foreign Intelligence," *Wall Street Journal*, March 9, 1978, at 24, stating that the legislation re-

flects "a certain lightheadedness about the damage [intelligence] reform will do to indispensable constitutional limitations.")

During these confirmation hearings, Judge Bork appeared to persist in his view that the Foreign Intelligence Surveillance Act is unconstitutional. (Comm. Print Draft, Vol. 1, at 315.)

Judge Bork has also expressed the view that Congress lacks the constitutional authority to regulate the activities of the CIA. In a 1979 panel discussion at the American Enterprise Institute for Public Policy Research, he expressed great doubt about the constitutionality of legislation establishing a charter for the Central Intelligence Agency (CIA) that contained substantive limitations on the Agency's authority:

A substantive [CIA] charter that says what will be prohibited and what will be allowed . . . would seem to be a congressional attempt to control the president's power in this respect. It verges upon unconstitutionality, and may well be unconstitutional, because the president has broad powers, as commander-in-chief and as the executive who conducts our foreign relations in this area. A congressional charter that told him what he could or could not do in detail would be an attempt to control his constitutional powers at the tactical level. (*Foreign Intelligence: Legal and Democratic Controls*, 8 (Amer. Ent. Inst. 1979).) (See also American Bar Ass'n, *Law Intelligence and National Security Workshop* 62 (1979), in which Judge Bork expressed the view that a CIA charter "is indeed unconstitutional.")

The committee finds Judge Bork's views on these questions to be extreme and quite troubling. Indeed, Professor Sunstein described Judge Bork's views on the Act's limitation on presidential power to conduct surveillance of foreign intelligence activities as "extremely adventurous and indeed quite curious." He continued:

It is true, as Judge Bork suggests, that the President has discretionary power, under the Commander-in-Chief clause, to make tactical decisions during war. But to say this is not to suggest that Congress is without power to impose limitations on surveillance. Whether the President has the power to engage in surveillance without congressional authorization is itself a disputed and difficult question. But the key point here is that under the necessary and proper clause, limitations by Congress appear to fall plainly within legislative power. The President has no "inherent" authority, **in the face of a congressional judgment to the contrary**, to engage in surveillance activities. In some respects, Judge Bork's position here is his most idiosyncratic of all those [Professor Sunstein addresses]—and in greatest tension with judicial restraint and respect for precedent. (Comm. Print Draft, Vol. 3, at 1331-1332; emphasis in original.)

Reasonable people may differ about whether particular intelligence activities are appropriate or inappropriate. But under our constitutional system of checks and balances, Congress simply must

have the power to oversee and ultimately to control the ability of the Executive Branch to conduct intelligence operations. In light of the Framers' great concern about the risks presented by concentrated power in the Executive Branch, the committee finds Judge Bork's rejection of congressional limitations on such power particularly disturbing.

C. Judge Bork Has Said that the Special Prosecutor Legislation Is Unconstitutional

In November 1973, in the aftermath of the firing of Watergate Special Prosecutor Archibald Cox (*see* Section VI, *infra*), a number of measures were introduced in Congress to provide for establishment of an independent special prosecutor when allegations were made of wrongdoing by high-level Administration officials. Judge Bork testified that that legislation was unconstitutional. At that time, he told this committee:

The question is whether congressional legislation appointing a special prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid and whether it would provide significant advantages that make it worth taking a constitutionally risky course. I am persuaded that such a course would almost certainly not be valid, and would, in any event, pose more problems than it would solve. (*Special Prosecutor*, Hearings before the Senate Judiciary Committee, 450 (1973); *see also Grand Jury Legislation*, Hearings before the Subcommittee on Criminal Justice of the House Judiciary Committee, 252 (1973), in which Judge Bork repeated these views.)

During these confirmation hearings, Judge Bork sought to distance himself from these views by suggesting that the legislation about which he testified was significantly different from that ultimately adopted by Congress. (Comm. Print Draft, Vol. 1, at 316, 698.) But as Professor Sunstein testified:

[T]he provision to which Judge Bork objected in 1973 is, in relevant part, *identical* to the provision now in effect. Judge Bork's principal objection was to judicial appointment of a special prosecutor. The provision for judicial appointment remains in current law, apparently on the understanding that the President should not be entrusted with appointing the person prosecuting his own high-level employees. (Comm. Print Draft, Vol. 3, at 1318-1319.)

Judge Bork's view that court-appointed independent counsels are unconstitutional is troubling because of his adherence to a rigid version of the separation of powers, without any regard for the practical accommodations that are inherent in our system of checks and balances. At rare times, the appearance of possible corruption within the upper levels of the executive branch threatens public confidence in government itself. In some instances, the impartial investigation by government officials of the executive branch, especially of those individuals who are politically or personally close to the President, seems impossible. Following the national trauma of Watergate, Congress faced up to that problem and

devised a balanced legislative solution—which has twice been reauthorized—that has significantly helped to restore public confidence. The series of constitutional arguments devised by Judge Bork against such incipient special prosecutor statutes is consistent with his willingness in other contexts to restrict Congressional power, and to enhance and protect the autonomy of the President.

D. Judge Bork Has Opposed the Notion of Congressional Standing to Challenge Presidential Actions

From time to time, members of Congress—and even the Senate itself—have had to bring lawsuits in federal court to challenge abuses by the President of Congress's constitutional prerogatives. Throughout his professional career, Judge Bork has expressed opposition to the notion that members of Congress, or the institution itself, have "standing" to maintain such actions.

While Solicitor General, Judge Bork decided not to seek Supreme Court review of the decision of the Court of Appeals for the District of Columbia Circuit in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), which held that a member of the Senate had standing to challenge an unconstitutional pocket veto on the ground that it had nullified his vote. In a January 26, 1976 memorandum to the Attorney General, then-Solicitor General Bork summarized the reasons for his failure to appeal the *Sampson* decision. After indicating that the Executive Branch was likely to lose on the merits and had changed its policy with respect to the use of pocket vetos, he stated:

[W]e regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue—a question the Court obviously would have had to reach prior to dealing with the merits of the case. . . .

[Pocket veto] cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. The dispute concerning congressional standing will, in the long run, pose a much more serious threat to traditional executive prerogative and to constitutional modes of governance than does acceptance of a narrowed scope of the pocket veto power. . . . (Memorandum to the Attorney General from Solicitor General re: Pocket Vetos, January 26, 1976, at 10; (emphasis added).)

After expressing doubts about the congressional standing doctrine in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983),⁸ Judge Bork urged complete abolition of congressional standing and overruling of *Kennedy v. Sampson* in his dissent in *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985). At issue in *Barnes* was the constitutionality of President Reagan's attempt-

⁸ Judge Bork's continuing animosity to the concept of congressional standing is apparent from his actions in *Vander Jagt v. O'Neill*, 699 F.2d 1166, cert. denied, 464 U.S. 823 (1983), which are discussed in Part Three, Section VIII, *supra*, and from his concurring opinion in that case. (See 699 F.2d at 1177-82.)

ed pocket veto of a measure restricting aid to El Salvador. The Senate itself along with 33 individual Members of Congress and the Bipartisan Leadership of the House of Representatives, brought suit to obtain a declaration that the measure had been duly enacted as law.

The panel majority held that the congressional plaintiffs had standing based on the court's prior opinion in the *Sampson* case. Judge Bork dissented, stating, quite bluntly, his belief that the courts "ought to renounce outright the whole notion of congressional standing." (759 F.2d at 41.) He described in harsh terms what he perceived to be the consequences of permitting congressional standing:

[W]hen federal courts approach the brink of 'general supervision of government,' as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties. (*Id.* at 71, quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).)

In response to questioning by Senator Byrd, Judge Bork adhered to the view he expressed in *Barnes*. He contended that his hostility to congressional standing was premised on his concern that it could lead to a proliferation of lawsuits by any of the three branches of government, making the judiciary the "umpire." (Comm. Print Draft, Vol. 1, at 544-545.) The colloquy between Senator Byrd and Judge Bork is informative:

Senator BYRD. So it is possible that Congress could be given standing?

Judge BORK. Yes. It is possible in that kind of case [National Security Emergency]. I do not think in the routine case I would ever agree to it.

Senator BYRD. So the statement, 'we ought to renounce outright the whole notion of Congressional standing,' you do not subscribe to that 100 percent today?

Judge BORK. Well, I subscribe to it in the regular kind of case. I do not think the courts ought to thrust themselves into legislative and Presidential business and be deciding it. . . . (Comm. Print Draft, Vol. 1, at 548.)

Judge Bork's repudiation of congressional standing contrasts markedly with Justice Powell's views. In *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell rejected the notion that it is never appropriate for the judicial branch to adjudicate constitutional disputes between the President and the Congress:

Interpretation of the Constitution does not imply lack of respect for a coordinate branch. If the President and the Congress had reached irreconcilable positions, final disposition of the question presented . . . would eliminate, rather than create, multiple constitutional interpretations. The specter of the federal government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty 'to say what the law is.' (*Id.* at 1001, quoting *United States v. Nixon*, 418 U.S. 683, 703

(1974), quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803).)

Many significant laws adopted by Congress operate to restrict presidential power, without directly affecting the interests of persons likely to venture into court when the President ignores the law. Statutory limits on arms sales to foreign countries are one example. If the President unconstitutionally seeks to pocket veto such a limitation, no private party is likely to be adversely affected in a manner likely to lead to adjudication of the question by a federal court. If the Congress lacks standing to challenge such an unconstitutional pocket veto, the President would be free to ignore a duly enacted statute with impunity, subject only to the ultimate sanction of impeachment. As Senator Kennedy stated: "[C]ongressional standing may not always be appropriate, but it clearly is appropriate when the President unconstitutionally claims a duly enacted law is not a law at all." (Comm. Print Draft, Vol. 1, at 318.)

Reasonable people may differ about the circumstances under which it is appropriate for the federal courts to entertain lawsuits brought by Members of Congress—or the institution itself—to vindicate Congress's constitutional prerogatives. The committee finds alarming, however, Judge Bork's categorical rejection of congressional standing in all instances. As Justice Powell recognized, when Congress and the President reach irreconcilable positions regarding a matter of constitutional law, resolution of that conflict by the courts is fully consistent with the constitutional responsibility of the judicial branch "to say what the law is."

E. Judge Bork's Views on Executive Privilege Are Entirely Consistent with and Analogous to His Position on Congressional Standing

In a dissenting opinion in *Wolfe v. Department HHS*, 815 F.2d 1527 (D.C. Cir. 1987) (a case brought under the Freedom of Information Act seeking access to materials relating to proposed FDA regulations), the nominee "takes executive privilege as far as, and probably further than, any judge who has yet addressed the issue." (Sunstein statement, Comm. Print Draft, Vol. 3, at 1338.) He argued that in light of the imperatives of the modern administrative state, executive privilege should not be restricted to the President himself. Under this sweeping analysis, any government official acting in the performance of duties delegated to him by the President would be immune from divulging to Congress, the courts or the public communications generated in the course of such activities. Thus, Judge Bork would apparently further isolate the President and the entire executive branch from accountability to the other co-equal branches of government.

* * * * *

The committee believes that Judge Bork's views on the scope of presidential authority are troubling, not merely because those views would impose unprecedented limitations on Congress's ability to curb abuses of presidential power, but because his views in this area are the antithesis of judicial restraint. In the area of executive power, Judge Bork shows little deference to duly enacted legislation and little regard for either the text of the Constitution itself or

for the principle of checks and balances that resonates throughout the document.

VI. WATERGATE

A. Judge Bork's Actions During and After the Saturday Night Massacre Remain Controversial

The events surrounding the Saturday Night Massacre—the firing of Watergate Special Prosecutor Archibald Cox and the “firestorm” of public and congressional protests it generated—represent a pivotal moment in American history. Public outrage over such a blatant abuse of presidential power to shield criminal wrongdoing from justice led directly to impeachment proceedings in the House Judiciary Committee against President Richard M. Nixon. Those proceedings, and the public demand for the reestablishment of the Office of Watergate Special Prosecutor, triggered a chain of events that led inexorably to the historic resignation of President Nixon less than 10 months later.

In order to understand fully the events at issue, it is necessary to review briefly the context in which the firing of Archibald Cox occurred.

The concept of a Watergate Special Prosecutor achieved widespread public acceptance in May 1973, following the resignation on April 30, 1973, of top presidential aides H.R. Haldeman, John Ehrlichman, and John Dean, and of Attorney General Richard Kleindienst. These resignations triggered the introduction of numerous resolutions in Congress calling for the appointment of an independent special prosecutor to investigate the entire Watergate matter.

When Elliot Richardson was nominated to be the new Attorney General, he immediately pledged to appoint a special prosecutor. During Richardson's confirmation hearings, members of this Committee—and other Senators—engaged in extensive discussions with Attorney General-designate Richardson concerning the charter for the special prosecutor's office. The charter provided that the special prosecutor could not be dismissed except for “extraordinary improprieties,” and that the special prosecutor would “carry out his responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.” (28 C.F.R. Section 0.37, Subpart G-1 (May 31, 1973).) It was not until the committee agreed to the text of that charter, and until Mr. Richardson had agreed to publish the charter as a department regulation in the *Federal Register* to give it the force of law, that the committee proceeded to recommend his confirmation by the Senate.

The events leading to the confrontation between President Nixon and the special prosecutor's office were eloquently described by former Assistant Watergate Special Prosecutor George T. Framp-ton, Jr.:

In June 1973, John Dean testified under immunity in televised Senate hearings that President Nixon participated in a Watergate cover-up. The President and every one of his close aides . . . all disputed Dean's version of events. In

July 1973, the existence of the White House taping system was revealed. H.R. Haldeman testified that he personally had listened to some of the key Dean-Nixon conversations. The tapes themselves, Haldeman claimed, showed that the President, not Dean, was telling the truth about those meetings. By October, resolution of this conflict in testimony was the critical factor in completing the Watergate investigation. . . . Obtaining the Nixon tapes was a prerequisite to any successful prosecution of high-ranking White House aides. (Committee Print Draft, Vol. 3, at 1720.)

The special prosecutor's office obtained a court order requiring the President to turn over certain key tapes. In October 1973, that order was affirmed by the entire United States Court of Appeals for the District of Columbia Circuit. President Nixon's lawyers then proposed a "compromise" under which transcripts of the tapes would be turned over to the special prosecutor after being checked by a Member of the Senate. When Archibald Cox insisted on enforcement of the court order requiring production of the tapes, on October 20, 1973, President Nixon ordered his dismissal.

Attorney General Richardson and Deputy Attorney General William Ruckelshaus both resigned rather than follow the order. The task then fell to then-Solicitor General Robert Bork, who fired Mr. Cox on October 20, 1973.

On October 23, Judge Bork abolished the Office of Watergate Special Prosecutor and transferred the investigation to the Criminal Division of the Department of Justice under the direction of Assistant Attorney General Henry Petersen (and, through Petersen, then-Acting Attorney General Bork). In response to intense public and congressional demand for an independent investigation of the Watergate cover-up, President Nixon announced on Friday, October 26, 1973, that a new special prosecutor would be appointed.

The areas of concern for members of the committee regarding Judge Bork's actions include: (1) the legality of Judge Bork's firing of Archibald Cox; (2) Judge Bork's actions following the firing insofar as they may call into question his commitment to an independent, effective investigation of the White House cover-up; and (3) Judge Bork's views of executive power, in light of his actions at a moment of national crisis. In evaluating these areas of concern, the committee has considered the nominee's positions and representations in his private discussions at the time, and the inconsistencies in different participants' recollections about those positions and representations.

B. Judge Bork's Discharge of Special Prosecutor Archibald Cox Violated an Existing Justice Department Regulation Which had the Force and Effect of Law

Judge Bork and his supporters have defended the legality of his firing of Watergate Special Prosecutor Archibald Cox by making two distinct and not entirely consistent arguments. First, former Attorney General Richardson and Judge Bork have argued that the Justice Department regulations governing the Office of Watergate Special Prosecutor were simply Mr. Richardson's "personal commitment to this Committee . . . that . . . should [not] be regarded

as binding on the Justice Department generally or on anyone who might succeed me as Attorney General." (Written Statement of Elliot L. Richardson, Comm. Print Draft, Vol. 3 at 1651.) Second, Judge Bork has argued "that the President has a right to discharge any member of the Executive Branch he chooses to discharge." (Press Conference of October 24, 1973, at 4.)

There is and has always been one insuperable problem with the first argument—that the charter was merely a personal commitment of Mr. Richardson. The regulation at issue simply does not read and has not been interpreted that way. Judge Gerhard Gesell decided in *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), *vacated*, No. 74-1620 (D.C. Cir. Aug 20 and Oct. 22, 1975), that the firing of Mr. Cox was indeed illegal, principally because the discharge "was in clear violation of an existing Justice Department regulation having the force of law." (366 F. Supp. at 108.) The regulation specified that the Watergate Special Prosecutor could be fired only for "extraordinary improprieties," and that he would otherwise "carry out [his] responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself." (28 C.F.R. Section 0.37, Subpart G-1 (May 31, 1973).)

Furthermore, as Senator Kennedy pointed out, during Attorney General-designate Richardson's confirmation hearings in 1973, Mr. Richardson had agreed to publish the special prosecutor's charter in the *Federal Register* so that the charter would have the force of law:

As a member of this Committee, I remember very clearly. I was very much involved . . . I think it [is] beyond imagination that the members of this Committee were thinking that [the charter] was just established for Mr. Richardson and not [for the Department.] . . . I think it is very clear . . . from the record and the history and what this country was faced with [at that time], that [the charter] was not a personal contract with Mr. Richardson, but . . . with the office [of the Attorney General] itself. (Comm. Print Draft, Vol. 3, at 1660.)

While the *Nader* decision was subsequently vacated as moot because Mr. Cox did not seek reinstatement after a new special prosecutor was appointed, its basic holding—that the special prosecutor's charter was legally binding—was emphatically reaffirmed by the Supreme Court in the landmark case of *U.S. v. Nixon*, 418 U.S. 683 (1974): "So long as this [special prosecutor] regulation is extant, it has the force of law . . . [and] the Executive branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." (*Id.* at 695, 696.)

The second argument made in defense of Mr. Cox's firing is that the President has the authority to fire any member of the Executive Branch. In testimony before this committee, Judge Bork stated to the same effect that this presidential right is properly exercised "where a department head issues a regulation and the President . . . gives an order to abolish that regulation, which is, in effect,

what happened." (Comm. Print Draft, Vol. 1, at 168; emphasis added.) There are several problems with this argument.

One difficulty is that the claim that the President can "abolish" a regulation is at odds with the assertion that there was no regulation—only a personal "commitment"—to abolish. Another difficulty is that it does not accord with the record of events. The regulation was not *in fact* rescinded until October 23, three days after the firing of Mr. Cox.⁹ Moreover, the regulation was rescinded by Judge Bork without any express order from President Nixon instructing him to do so—and the rescission was deemed "arbitrary and unreasonable" by the District Court in *Nader*. (366 F. Supp. at 109.)

Still another difficulty is with Judge Bork's assumption that a peremptory rescission pursuant to such a presidential order would, in fact, be legal, a position unsupported by case law. The assumption that such broad executive power existed and could properly be exercised for President Nixon's particular purposes at that time indicates a disturbingly expansive view of executive power. (See generally Part Three, Section V, *supra*.)

C. The Evidence and Testimony on Certain Factual Questions Are Contradictory. But at a Minimum They Establish That Judge Bork's Actions Immediately Following the Saturday Night Massacre Reveal a Misunderstanding of the Separation of Powers

On at least two key questions, Judge Bork has not always given a consistent description of his actions in the days immediately following the Saturday Night Massacre. The first issue concerns pursuit of the tapes.

In his 1982 confirmation hearings, Judge Bork testified that he spoke to Mr. Cox's deputies, Henry Ruth and Philip Lacovara, at a meeting on Sunday, October 21, 1973, which was also attended by Assistant Attorney General Petersen,

telling them that they would have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted . . . to do precisely what they had been doing under Mr. Cox. (1982 Confirmation Hearings at 9; emphasis added).

That account is contradicted by Henry Ruth's testimony. Mr. Ruth stated that the Watergate Prosecution Force staff did not receive assurances from Judge Bork at that meeting that they could continue to seek the White House tapes:

No one in that room had any power, in my opinion, to do anything. Mr. Bork was entirely irrelevant. The show was

⁹ In his 1982 confirmation hearings, Judge Bork sought to belittle the significance of this fact, stating: "I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important." (Testimony of Robert H. Bork, "Confirmation of Federal Judges," *Hearings Before the Senate Committee on the Judiciary*, 97th Cong., 2nd Sess., Part 3 at 9.) The committee strongly believes, however, that the question of whether Judge Bork acted according to law when he fired Mr. Cox is fundamentally important. Strict adherence to the rule of law can never be more important than during a time of grave constitutional confrontation.

being run by the White House. . . . No one in that room knew what was going to happen the next time we subpoenaed a tape and the court upheld it and the President said no. Mr. Bork never told us his position on that issue. (Comm. Print Draft, Vol. 3, at 1728.)

Judge Bork did acknowledge in his recent testimony before the committee that neither of the deputies remembered any mention of tapes at that meeting, but that "the common recollection . . . [was] I said that they were to go forward as before. . . ." (Comm. Print Draft, Vol. 1 at 122.) The most that Mr. Lacovara said, in a statement submitted to the committee on behalf of Judge Bork, was that the nominee "expected a full and a thorough investigation of all matters under our jurisdiction." (Written Statement of Philip A. Lacovara, Comm. Print Draft, Vol. 3, at 1744.) This was, of course, simply a restatement of President Nixon's authorization to Judge Bork on October 20.

The more recent recollections of those involved are particularly significant because of the light they shed on Judge Bork's characterization of the mission of the special prosecutor's staff after the Saturday Night Massacre. To expect that the staff could in fact continue "to do precisely what they had been doing under Mr. Cox" was, in the view of the committee, most unrealistic. "What they had been doing under Mr. Cox" was to pursue the tapes so vigorously that President Nixon had Mr. Cox fired for it. It is understandable that Mr. Cox's staff was somewhat skeptical of assurances of access to the tapes and of "vigorous" prosecutions from an official who had been the instrument of that firing.

Second, a question exists about exactly when Judge Bork began to search for a new special prosecutor. The history of the Watergate investigation makes clear that a complete investigation was allowed to proceed only because the President was forced to acquiesce in the appointment of a new special prosecutor within a week after Mr. Cox's discharge.

Judge Bork and his supporters have contended that he began the search for a new special prosecutor immediately after Mr. Cox was fired so that a complete investigation could continue. But according to Judge Bork's own statement at the time, the regulation was rescinded—*three days after the firing*—because "the matter was to be held and handled within the Criminal Division under my over-all authority . . . and that charter [the Special Prosecutor regulation] was inappropriate at that time. ("White House Press Conference of Acting Attorney General Robert H. Bork on the Appointment of Leon Jaworski as Watergate Special Prosecutor," November 1, 1973, at 3.) And when he was nominated to the Court of Appeals in 1982, Judge Bork told William T. Coleman, Jr., the American Bar Association's reviewer, that "immediately after firing Mr. Cox, I set out to find a new Watergate Special Prosecutor." (See Committee insert at 974)

Returning to his 1973 position, Judge Bork told the committee during these hearings that the decision to appoint a new special prosecutor was not made until several days after the Cox firing, when the White House was forced to accede to political pressure:

Senator METZENBAUM. But you had no guarantee from President Nixon at the time he fired Mr. Cox that there would even be another special prosecutor. Is it not a fact that the decision to appoint a new special prosecutor was not made until several days after the President had provided a firestorm of controversy around the country?

Judge BORK. That is right. Initially, we intended to leave the Special Prosecution Force intact but not to appoint a new special prosecutor, and they would go on under Mr. Ruth and Mr. Lacovara as before. But we did not initially contemplate a new special prosecutor until we saw that it was necessary because the American people would not be mollified without one. (Comm. Print Draft, Vol. 1., at 206.)

While this latter testimony seems more consistent with the public record, Judge Bork's 1982 remarks to Secretary Coleman, as well as the testimony delivered recently on Judge Bork's behalf suggested that he was energetically seeking a new special prosecutor by "Monday . . . just a few hours after the Saturday Night Massacre. . . ." (Testimony of Professor Dallin Oaks, Comm. Print Draft, Vol. 3, at 1503.) In response to a question by Senator Kennedy, Mr. Ruth indicated that he believed to be accurate Judge Bork's statement that he did not set out to find a new special prosecutor until the American people indicated that they would not be mollified without one. Referring to Judge Bork's actions at the time, Mr. Ruth commented:

We never thought that Mr. Bork was in favor of a new Special Prosecutor, and the only reason we were staying at a unit was because we thought the Republican congressional reaction was going to force Mr. Nixon to appoint a new special prosecutor. (Comm. Print Draft, Vol. 3, at 1729.)

At least through October 23, therefore, there could hardly have been a serious intention to appoint a new Special Prosecutor who, realistically, would be independent enough to go after the tapes—regardless of what Judge Bork's personal expectations were about access to the tapes. Moreover, as the suggestion that the search began on Monday is also inconsistent with Judge Bork's recent testimony, the committee concludes that the discrepancy is most likely one of understandably different recollections of timing regarding events of 14 years ago. The nominee probably did vigorously seek a new special prosecutor by the end of that week (of October 21-26, 1973), once "politically, he realized he had to have a special prosecutor." (Testimony of Henry Ruth, Comm. Print Draft, Vol. 3, at 1759.)

* * * * *

In the committee's view, perhaps the most significant aspect regarding the firing of the Watergate Special Prosecutor is Judge Bork's immediate and continuing perception that an effective Watergate investigation could be run out of the same Department of Justice that had just carried out the task of firing Mr. Cox for seeking to run such an investigation. The degree of deference to executive authority and executive representations required to hold that

perception is astonishing in the face of the abuses of executive authority represented by President Nixon's actions at the time.

Institutionalized checks on unrestrained power constitute the very life of our Constitution and are an indispensable ingredient of our freedom. The great deference to executive power shown by the nominee in the actions related here, as well as in many of his other statements and judicial opinions, (see generally Part III, Section V, *supra*), seems inappropriate for a member of a Supreme Court, which is responsible for preserving the constitutional system of checks and balances.

VII. ANTITRUST

Judge Bork's has called antitrust "a particularly instructive microcosm" of his over-all judicial, social and political philosophy. Despite his reputation as a practitioner of judicial restraint, he is, in the words of Robert Pitofsky, a respected antitrust scholar and Dean of the Georgetown University Law Center, "an activist of the right" in the antitrust field, "ready and willing to substitute his views for legislative history and precedent in order to achieve his ideological goals; and . . . even when examined by comparison to other conservative critics of antitrust enforcement, his views are extreme." (Comm. Print Draft. Vol. 3, at 2000.) Judge Bork's appointment to the Supreme Court is likely to result in "antitrust changes of truly tidal proportions" that, in the words of the editor of the *Antitrust Law and Economics Review* (a professional journal for antitrust economists), "are likely to do great damage to the country's domestic and thus its international competitiveness well into the 21st century." (Letter to Hon. Edward Kennedy, August 13, 1987.)

A. Judge Bork's Antitrust Theory Was Well Established Prior to the Hearings

1. Judge Bork's Basic Theory Ignores Congressional Intent by Contending that "Efficiency" Is the Only Goal of the Antitrust Laws

Judge Bork made his early reputation as an antitrust scholar. He first attracted attention in the 1960s with several important articles arguing that there was too much antitrust enforcement. (See, e.g., "The Crisis in Antitrust," *Fortune*, December, 1963.) He expanded his analysis into an influential book, *The Antitrust Paradox*, published in 1978, and he has continued to write and lecture on the subject while serving on the D.C. Circuit Court of Appeals. While Judge Bork has, over the past few years, tried to distance himself from earlier views in several other areas of the law, he still is closely associated with his long-held views on antitrust.

The central premise of Judge Bork's antitrust philosophy is that in enacting the federal antitrust laws, Congress sought to promote only one purpose—industrial or "allocation" efficiency, which he has labeled "consumer welfare." In fact, he has repeatedly called the promotion of economic efficiency the only legitimate goal of antitrust.

"Consumer welfare" is a technical economic concept that relates to efficiency in an economy-wide sense. As used by Judge Bork, it

really has little to do with the more commonly understood definition—that is, the unfair acquisition of consumers' wealth by firms with market power. Higher prices to consumers are not troublesome to Judge Bork as long as the monopolistic business produces efficiently.

Pivotal to Judge Bork's analysis is his view of the legislative history of the Sherman Act and the other basic antitrust statutes, such as the Clayton Act and the Federal Trade Commission Act. Judge Bork has asserted that there is "not a scintilla of support" in the legislative history of the Sherman Act for "broad social, political and ethical mandates." ("Legislative Intent and the Policy of the Sherman Act," 9 *J. L. & Econ.* 7, 10 (1966).) Rather, he says that the original drafters had a single intent—to enhance economic efficiency.

A number of recognized antitrust scholars, however, have taken exception to this limited reading of the "original intent" of the antitrust statutes. They argue that Congress was equally concerned about the concentration of economic and political power; with the unfair exploitation of consumers by firms with monopoly power; and to a lesser but still significant extent, with the preservation of small business and the threat of direct government regulation which monopoly power posed. See, Pitofsky testimony, Comm. Print Draft, Vol. 3 at 2001-08; Pitofsky, "The Political Content of Antitrust", 127 *U. Pa. L. Rev.* 1051-75 (1979); Lande, "Wealth Transfers as the Original Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 *Hastings L. J.* 65-151 (1982.)

2. Judge Bork's Antitrust Policies Are at Sharp Odds with Current Law

If Judge Bork's vision of antitrust prevailed, consumers would have substantially fewer protections under the antitrust laws than is the case under current law. In his view, only three classes of business conduct should be illegal: (1) Horizontal agreements to fix prices or divide markets, **but only** when these restraints are not a legitimate aid to some other activity that promotes efficiency; (2) horizontal mergers that leave less than three significant rivals in a market; and (3) monopolistic practices to drive out rivals or raise barriers to entry.

Horizontal Mergers: These are mergers between direct competitors in the same market. Judge Bork's views on horizontal mergers are among his most controversial and extreme. To Judge Bork, the rewards of efficiency resulting from horizontal combinations are so great that there should be no legal obstacle to horizontal mergers unless they result in fewer than three significant firms holding 60 to 70 percent of the market. Judge Bork relies on market share as the only test of whether a merger should be allowed to go forward, in contravention to long-standing Supreme Court precedent. (See, e.g., *Brown Shoe v. U.S.*, 370 U.S. 294 (1962).)

Vertical and Conglomerate Mergers: These are mergers between persons at different levels of the distribution chain (such as manufacturer and retailer) or between companies in unrelated businesses. Judge Bork argues that vertical mergers enhance efficiency and are harmless to competition because they merely internalize transactions that would otherwise occur in the market. Judge Bork be-

believes that "antitrust should never interfere with any conglomerate merger" (*The Antitrust Paradox* at 248) as there can be no harmful effect on competition.

Resale Price Fixing: Judge Bork believes that all vertical restraints, including resale price fixing, should be "completely lawful." (*Antitrust Paradox* at 288.) He contends that the Supreme Court erroneously concluded in 1911 that vertical price fixing should be *per se* illegal and that the mistake has been compounded ever since. He maintains that many efficiencies result from resale price fixing, including the inducement to dealers to provide additional services such as demonstrations or repairs. In this area, Judge Bork's views are directly contrary to expressed congressional policy, including legislation to outlaw state fair trade laws and recent amendments to various appropriations bills that have prohibited the Justice Department from filing *amicus curiae* briefs in support of the argument that resale price fixing should be legal *per se*.

3. The Hearing Testimony Reflected Serious Concern About Judge Bork's Antitrust Views

In testimony before the committee, New York State Attorney General Robert Abrams aptly summed up the potential impact of Judge Bork's antitrust views:

If confirmed, Judge Bork seems likely to attempt to swing the Supreme Court to the following specific antitrust positions, beyond his primary goal to make all antitrust cases an inquiry into efficiency considerations using market share data as the primary evidentiary tool.

1. All vertical price-fixing and all non-price vertical restraints of trade would be lawful.

2. All conglomerate and vertical mergers would be lawful.

3. All horizontal mergers would be permitted up to and including the point at which an industry was left with only three substantial firms, one of which could attain 40% market share. This equates to a permissible HHI [Herfindahl Index] concentration ratio of roughly 3400, whereas both the Justice Department and the State Attorneys General Merger Guidelines now consider HHI of 1800 to be the threshold of high concentration and likely antitrust intervention.

4. All tying arrangements and exclusive dealing arrangements would be lawful.

5. Claims of predatory pricing and price discrimination would no longer be actionable.

6. Horizontal price fixing and market allocation would be lawful if engaged in by sellers with roughly 40% or less market share, who were engaged in some other legitimate form of integration, such as joint advertising. (Comm. Print Draft, Vol. 3, at 1973-79; footnotes omitted.)

The practical effect of these legal policies would have serious consequences for the American economy and the American consumer. Applying Judge Bork's rule on mergers would permit very

large consolidations of economic power in this country. For example, it could permit a merger between Texaco and Exxon in the oil industry, or the takeover of Coca-Cola by Seven-Up. Taking international competition into account, Ford might be able to merge with Chrysler. Based on his view that the antitrust laws should not be applied to conglomerate mergers, Judge Bork would not prevent a handful of "mega-corporations" from developing. (See Pitofsky testimony, Comm. Print Draft, Vol. 3, at 1998.)

Finally, Judge Bork's view that vertical price fixing should be legal would be especially harmful to consumers. As elicited in questioning by Senator Metzenbaum, many discount retailers would be put out of business, forcing consumers to pay higher prices dictated by manufacturers:

Senator METZENBAUM. You [Judge Bork] believe that the rule that we have had in this country since 1911 which prohibits manufacturers from fixing the retail price of their products should be overturned. You have written, and I quote, that "it should be completely lawful"—that is your phrase, "completely lawful"—"for a manufacturer to fix retail prices."

In other words, if somebody like K-Mart or Toys "R" Us or some discounter is selling children's shoes at \$25 and the manufacturer wants them sold at \$50, under your theory it would be entirely lawful for the manufacturer to require the retailer to charge the higher price. Now, that is price fixing, pure and simple, and it has been illegal since 1911. . . .

Tell me in language that you and I can understand, and the American people can understand, how you can argue that price fixing is going to help the consumer?

Judge BORK. The manufacturer who is fixing the price of the dealers has no reason in this world to want to give them a fatter profit. What he wants them to do, usually, is to compete in a different way; compete by providing information, compete by providing selling services, compete by adding things to the product.

Now, those are not bad activities and if he could own those dealers himself, or if he owned them himself, he would probably sell at the price he fixed and add those services. It is merely a way of doing by contract what he could do if he owned them, and the purpose is to get these people to compete in other ways and not below a certain price.

Senator METZENBAUM. As a matter of fact, I have a pretty good ally on this particular issue, and that is, President Reagan spoke out against fair trade laws, saying they hurt consumers by keeping prices up. Do you think the President was wrong?

Judge BORK. I do not think the President—the President may be right or wrong, but I do not think he has engaged in this analysis of the economics of the situation. . . . (Comm. Print Draft, Vol. 1, at 339-341.)

The concern over Judge Bork's antitrust views was articulated by the Attorney General of West Virginia, Charles G. Brown:

We would see the institutionalization of non-enforcement on the Federal level and the gradual erosion of this enforcement by the States. The real victims of a Bork anti-trust era on the Supreme Court will be consumers, small business entrepreneurs, and mid-sized corporations. For the individual buyer and the bold business person, there will be nothing free about the market created by Judge Bork. Price-fixing and exclusive dealing will rule the marketplace. Innovative industrialists will be absorbed in the great corporate giants. (Brown testimony, Comm. Print Draft, Vol. 3, at 1981.)

B. Judge Bork Has Shown Little Respect for Supreme Court Precedent in the Field of Antitrust

Judge Bork has criticized most of the landmark antitrust Supreme Court decisions, including *Brown Shoe v. United States*, 370 U.S. 294 (1962) (horizontal and vertical mergers); *FTC v. Procter & Gamble*, 386 U.S. 568 (1967) (conglomerate mergers); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (per se illegality of resale price maintenance); and *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949) (illegality of exclusive dealing arrangements). In fact, he has called the entire body of Supreme Court precedent in the antitrust field "mindless law." (*The Antitrust Paradox* at 411.)

Judge Bork has said that the Supreme Court occupies a unique place in this country's judicial system because it is not bound by the precedent of any court. Given that Judge Bork holds most of the Supreme Court's antitrust work in very low esteem, there is a substantial risk that he would utilize a position on the Court to rectify what he sees as the errors the Court has made by its failure to understand economic principles and the original intent of the antitrust statutes. If his writings are a fair guide, he could vote to overrule a substantial proportion of precedent in this field. (See Pitofsky Testimony, Comm. Print Draft, Vol. 3, at 1999.)

Judge Bork has written only one significant antitrust opinion while serving on the D.C. Circuit (*Rothery v. Atlas Van Lines*, 792 F. 2d. 210 (1986)), but that case clearly demonstrates that he will not hesitate to put his activist views into practice. *Rothery* was a simple case involving competitive restraints placed on a local agent by a national van line; neither party held a significant share of the market. Judge Bork reached out, however, to declare that two important Supreme Court cases on horizontal restraints had been effectively overruled, even though the Court itself has not taken such action, explicitly or implicitly. (See Pitofsky statement, Comm. Print Draft, Vol. 3, at 2009-2011.) He also pronounced that market power was the sole criteria for measuring the legitimacy of trade practices, and that it was unnecessary to engage in a more searching analysis of the positive and negative competitive effects of a particular business practice. In a concurring opinion, Chief Judge Wald sharply criticized Judge Bork's opinion.

The *Rothery* case demonstrates Judge Bork's adeptness at circumventing precedent to propel his reasoning to a desired conclusion. Responding to a question by Senator Specter suggesting that Judge Bork might "just be making a point in academic style as opposed to really setting down a final thought," Attorney General Brown of West Virginia pointed out the special significance of the *Rothery* case:

Senator Specter, I believe that he wants to bring the thoughts of *The Antitrust Paradox* right into his judicial work because he had done that. In *Rothery*, he took what was perceived as a rule of reason case, probably a vertical restraint case, made it a horizontal case in order to write his whole theory of horizontal boycotts and horizontal restraints of trade. . . . So I think that his ideas between the time he wrote the book and the time he got on the Court remained the same, and I think he has made every effort to bring those ideas right into the court work. . . . (Comm. Print Draft, Vol. 3, at 2086-87.)

C. Judge Bork's Willingness to Ignore the Will of Congress in the Antitrust Sharply Conflicts with His Professed Deference to the Will of the Majority

In the antitrust arena, Judge Bork has called for unprecedented judicial activism, proposing that the courts ignore almost 100 years of judicial precedents and congressional enactments. His views are particularly relevant to his constitutional jurisprudence because he has analogized the basic antitrust statutes to the Constitution: "[T]he antitrust laws are so open-textured, leave so much to be filled in by the judiciary, that the Court plays in antitrust almost as unconstrained a role as it does in constitutional law." (*The Antitrust Paradox* at 409.) Judge Bork uses the failure of the courts and the Congress to consider or understand economics to reject as "mindless law" cases and statutes that expand application of the antitrust laws beyond the narrow range of practices that he believes should be prohibited. His undisguised distrust of and disregard for congressional enactments cannot be reconciled with his professed philosophy of judicial deference to the will of Congress. This inconsistency is what Chairman Biden labeled "the Bork paradox." (Comm. Print Draft, Vol. 3, at 2065.)

In response to questioning during these hearings, Judge Bork did state that he would go along with the will of Congress in the antitrust field, even if he thought Congress's judgment was mistaken. Responding to a question posed by Senator Specter, Judge Bork said: "I am out there to follow Congress's intentions. . . . [I]f Congress says '[t]his thing threatens competition; strike it down,' I have to do that even if I do not think it threatens competition." (Comm. Print Draft, Vol. 1, at 690-91.) This current position represents a dramatic change, however, from Judge Bork's prior statements:

Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary. . . . It would have been best, therefore, if the courts first confronted with the Clayton

Act and later the Robinson-Patman Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences and like injure competition or lead to monopoly. . . . For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes never injure competition and hence are not illegal under the laws as written. (*The Antitrust Paradox* at 410.)

In the antitrust field, Judge Bork interprets congressional will selectively to suit his own agenda. He not only considers his interpretation of the original intent of the antitrust laws to be the only "correct" one, but he also denounces as unconstitutionally vague any conclusions to the contrary.

* * * * *

Dean Pitofsky gave a chilling summary of the impact of Judge Bork's "vision of antitrust:"

As a result, it is likely that this would be a very different country. Large firms could behave far more aggressively against rivals without fear of monopolization charges, each industry could become concentrated by merger to the point where only two or three firms remained, and wholesalers and retailers would be under the thumb of the suppliers as to where and at what price they can sell and what brands they can carry. Firms might continue to display vigorous competitive characteristics, but that would only be as a result of market forces. The antitrust laws would be available as a check should market forces fail to work properly. (Pitofsky statement, Comm. Print Draft, Vol. 3, at 2011.)

The impact of Judge Bork's views on antitrust laws was also well described in an exchange between Senator Kennedy, New York Attorney General Robert Abrams and West Virginia Attorney General Charles Brown:

Senator KENNEDY. I think the people in our country want to know how this nomination is going to affect the quality of their lives, and from what I know in terms of [Judge Bork's] antitrust positions it will have an important impact on . . . average citizens and their ability to purchase various goods. . . . Why should the consumers in the States that you represent be concerned about this judge, should his view[s] . . . on antitrust law become the law of the land?

Mr. ABRAMS. Judge Bork, if his views were to be adopted . . . would virtually eliminate 90-95 percent of the antitrust laws, and the kinds of protections that consumers have known for the better part of a century . . . [E]very day in the marketplace, there are situations where money is taken from the wallets of consumers because of predatory practices, anti-competitive practices, and if Judge Bork's agenda, which is long, was ever

implemented, these consumers would have no protection. . . .

Mr. Brown. It would be a disastrous impact, Senator Kennedy. I am glad you asked. The antitrust laws really benefit all of us. They benefit consumers in the way of lower prices. They benefit taxpayers. . . . They benefit business, bold entrepreneurs, people that want to compete, take chances. Those are the businesses that really benefit when you enforce the antitrust laws. This non-enforcement would have a terrible effect. (Comm. Print Draft, Vol. 3, at 2069-70.)

Judge Bork's antitrust views, together with the "Bork Paradox"—the willingness of Judge Bork to engage in judicial activism despite his supposed adherence to a philosophy of judicial restraint—are yet further reasons why the committee concludes that his nomination to the Supreme Court should be rejected.

VIII. JUDGE BORK'S ACTIONS IN *VANDER JAGT V. O'NEILL*

Judge Bork's conduct in connection with his participation as a judge in the case of *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983), raises questions concerning his judicial demeanor and attitude toward his colleagues on the bench. In *Vander Jagt*, 14 Republican Congressmen filed suit protesting their underrepresentation on certain House committees and alleging that they were being deprived of equal voting rights. The district court dismissed their complaint, and on appeal to the United States Court of Appeals for the District of Columbia Circuit, the case was assigned to a panel consisting of Judge Roger Robb, Judge Bork, and Judge James Gordon, a senior United States District Judge from the Western District of Kentucky who was sitting by designation.

At the conference following the March 19, 1982 oral argument in *Vander Jagt*, the panel unanimously agreed to find against the Republican Congressmen. Judges Robb and Gordon believed the case was governed by the remedial discretion doctrine previously articulated by Judge Robb in *Riegle v. Federal Open Market Committee*, 556 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). Under *Riegle*, a court can exercise its discretionary power to deny relief where separation of powers concerns dictate doing so; the court in that case had specifically rejected using lack of standing as a ground for denying relief. Judge Robb assigned the *Vander Jagt* opinion to Judge Bork, stating in his post-conference memorandum:

At conference, we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons. (Memorandum to Judge Bork and Judge Gordon from Judge Robb, March 19, 1982.)

Judge Gordon, in correspondence with the Judiciary Committee, recalled that Judge Bork had mentioned the "lack of standing doctrine" at the end of the conference, but that Judges Robb and Gordon had vigorously opposed that approach. Judge Gordon con-

cluded from the conversation that "[t]here is no way Judge Bork could have misunderstood Robb's and my position." (Letter to The Honorable Joseph Biden from Judge James F. Gordon, August 24, 1987, at 2 [hereinafter "Letter to Senator Biden"].)

On September 17, 1982—six months after the case was argued—Judge Bork circulated his proposed majority opinion denying relief on the ground that the Congressmen lacked standing to bring their suit. Moreover, rather than relying on *Riegle*, as the panel had agreed, Judge Bork's draft apparently suggested that that case had been overruled. The draft was sent without any explanation and was accompanied by a cover memorandum stating only that "[a]ttached is my proposed opinion in the above-mentioned case for your review and comment." (Memorandum to Judge Robb and Judge Gordon from Judge Bork, September 17, 1987.)

Judges Robb and Gordon were taken by surprise by the approach of Judge Bork's draft. Judge Robb, who is now deceased, was hospitalized at the time with a broken hip. His law clerk, Joseph D. Lee, submitted an affidavit to the Committee stating:

Although I do not recall Judge Robb's words at this point, I had the firm impression that he was both surprised and angered by these events. It was clear to me that he had not expected the draft opinion to dispose of the case on standing grounds or to suggest that *Riegle* was no longer good law. (Aff. of Joseph D. Lee, Oct. 2, 1987, at para. 8 [hereinafter "Aff. of Lee"].)

Similarly, Judge Gordon noted that "[he] was shocked, to say the least, at the tenor of the opinion . . ." (Letter to Senator Biden at 3.) Judge Gordon attempted to reach Judge Robb to discuss the draft opinion and was told that Judge Robb was hospitalized at the time. Judge Gordon then asked his law clerk to check with Judge Robb's law clerk to see if Judge Robb had changed his mind about the case.

Within the next week, another judge on the D.C. Circuit contacted Judge Gordon on behalf of Judge Robb, and instructed Judge Gordon to prepare the majority opinion granting standing to the Congressmen but denying relief based on *Riegle*. Judge Robb subsequently wrote a memorandum to Judges Bork and Gordon setting forth his disagreement with Judge Bork's proposed disposition of the case and again suggesting that Judge Gordon draft the opinion. (Memorandum to Judge Bork and Judge Gordon from Judge Robb, October 5, 1982.)

Judge Bork was apparently aware that he should have discussed his proposed disposition with the other panel members before circulating his draft. On September 24, 1982, he sought to remedy this omission and wrote to Judge Gordon that "[i]t occurs to me too late that I should have notified you in advance that I had changed the rationale in the *Vander Jagt* case to one of lack of standing." (Letter to the Honorable James F. Gordon from Judge Robert H. Bork, September 24, 1982.) And on October 8, 1982, Judge Bork wrote to both Judge Robb and Judge Gordon, stating that "[Judge Bork's] earlier failure to communicate is largely responsible for the confusion into which this case has been plunged. . . ." (Memorandum to Judge Robb and Judge Gordon from Judge Bork, October 8,

1982, at 1 [hereinafter "Memorandum to Judge Robb and Judge Gordon"].) He explained:

I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear *en banc* later this month. (*Id.* at para. 1.)

(The *en banc* decision, *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (*en banc*), dealt with the standing of taxpayers to challenge the constitutionality of a statute, as opposed to the very different matter of congressional standing to challenge the apportionment of committee seats in Congress.)

Judge Bork also stated that he had discussed his lack-of-standing approach with Judge Robb, and that the latter had agreed to that approach. The evidence is conflicting on this point. Judge Bork testified that "Judge Robb's secretary remembers me coming in to have that conversation., my clerks remember me going up and coming back and saying that Judge Robb had agreed." (Comm. Print Draft, Vol. 1, at 106.) Judge Robb's law clerk, however, found nothing in Judge Robb's files indicating that there had been such a meeting. (Aff. of Lee at para. 10.) Furthermore, Judge Gordon "[d]id not believe Judge Robb changed his position." (Aff. of Judge James F. Gordon, Oct. 2, 1987, at para. 3.)

Indeed, in his October 8, 1982 memorandum, Judge Bork noted that "Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed." (Memorandum to Judge Robb and Judge Gordon at para. 2.) Again, Judge Robb's law clerk takes issue with the implications of this statement:

During my clerkship with Judge Robb, he consistently impressed me as an extremely intelligent and thoughtful individual. I am unaware of any significant lapses of memory on his part before November 1982, when Judge Robb suffered a stroke. I think it very unlikely that had Judge Robb agreed in or after March 1982 to change the rationale of the *Vander Jagt* opinion to one of standing, he would have completely forgotten having done so by October 1982. (Aff. of Lee at para. 12.)

While Judge Bork may well have met with Judge Robb to discuss the case, it seems clear that Judge Robb, who was the author of *Riegle* and who so vehemently disagreed with Judge Bork's draft, did not agree to Judge Bork's rationale.

Because of the long delay in Judge Bork's handling of the case, the court's order was not filed until December 23, 1982, as Judge Gordon waited for Judge Bork to complete his concurring opinion. Thus, the disposition of the case was delayed until the waning days of the Congress, threatening to moot the case.

Judge Bork's actions in *Vander Jagt* raise serious concerns. Judge Bork testified that he drafted his proposed majority opinion as he did because he found that an opinion based on *Riegle* "will not write that way." (Comm. Print Draft, Vol. 1, at 106.) Judge

Gordon, of course, was able to write the opinion "that way." Furthermore, as Judge Shirley M. Hufstedler noted in a letter to the Committee:

When a writing judge runs into that kind of snag, the ordinary course is to discuss the problem with one's colleagues in a personal meeting, a telephone conference, or in an explanatory memorandum, with or without an accompanying draft opinion. (Letter to Senator Edward Kennedy from Shirley M. Hufstedler, October 3, 1987, at 10 [hereinafter "Letter from Judge Hufstedler"].)

While Judge Bork met with Judge Robb, the latter apparently rejected the lack-of-standing rationale. And Judge Bork never communicated with Judge Gordon until the latter protested the proposed disposition of the case.

Judge Bork testified that the implication that he attempted to pass off his own views as the views of the panel was not possible. He explained that "there is a rule in our Circuit that when the other two judges have concurred in your draft, you circulate the draft to the full Court . . . and their clerks all read it." (Comm. Print Draft, Vol. 1, at 107.) This rule does not address, however, relations among the three judges on a panel prior to circulating a draft opinion.

But apart from questions of judicial etiquette, Judge Bork's conduct evidences a lack of consideration for the rights of the litigants. While it is true that judicial opinions can sometimes take many months to write, a new judge—as Judge Bork was at the time—has no backlog of unwritten opinions to prevent his turning his immediate attention to drafting opinions. Judge Hufstedler suggests that, even with the other work of the chambers, "the writing of an opinion in the case should not have consumed more than two weeks." (Letter from Judge Hufstedler at 6.) But Judge Bork waited six months to circulate his draft—a draft relying on arguments that had already been rejected by the other two members of the panel.

* * * * *

As Judge Hufstedler has said: "Judge Bork's determination to state his convictions on standing were more important to him than his duty as a judge to decide the case before him." (Letter from Judge Hufstedler at 8.) Judge Gordon drew the same inference. He stated that he "shall be forever convinced that there was a design and plan in Judge Bork's actions and activities." (Letter to Senator Biden at 5.) He explained that he had "grave reason to suspect that perhaps Judge Bork intended to have his narrow 'no standing' view become the majority opinion of the Court and the law of the Circuit when, in fact, it was the minority opinion." (*Id.*)

IX. JUDGE BORK'S RULES AS SOLICITOR GENERAL AND AS A COURT OF APPEALS JUDGE

A. Solicitor General

Supporters of Judge Bork's confirmation have argued frequently that his record as Solicitor General supports the claim that he

favors minority and female rights. An examination of the nature of Judge Bork's role as Solicitor General does not, however, support this claim. Whatever might be said about the substance of Judge Bork's other positions on minority and women's rights, his own conception of the Solicitor General's office and his performance as head of it suggests that his tenure there is simply not of much relevance to an assessment of his likely performance on the Supreme Court.

1. Judge Bork's Own Statments and Positions Prior to the Hearings Demonstrate that He Took Positions as Solicitor General with Which He Personally Did Not Agree

Judge Bork's own statements in his confirmation hearings to be Solicitor General clearly outline his own concept of the position. When asked by the late Senator Phillip Hart if he would in fact be simply "the Government's appeal lawyer," Judge Bork responded: "That is quite accurate, Senator, yes." The colloquy continued:

Senator HART. It is a policy post?

Judge BORK. Not particularly, Senator. I view it as a post of being the attorney for the Government.

Senator HART. What if the Government takes a position in the field of antitrust or civil rights that you think is wrong, and have said in the past is wrong, what do you do?

Judge BORK. What will I do? I will enforce the policy of the Government in antitrust as the Government defines it. I do not define it, Senator. (Solicitor General Hearings at 8; emphasis added.)

Judge Bork reemphasized the close analogy of the attorney-client relationship to his new position when he was asked by Senator Tunney, "Do you think that you could sign a brief that was inconsistent with your personal views?" He responded, "I think I can, Senator, and I know I have." (*Solicitor General Hearings*, at 14.) The central obligation of the good attorney is to serve his client's interests, not to pursue his own policies. In this case, the interests of the client are the policies of the relevant Federal agencies.

Judge Bork's proponents have focused particularly on his as *amicus curiae* briefs to the Supreme Court—where the government, as a friend of the court, files a brief because it thinks a position is right rather than because it is a party to the lawsuit. The committee finds, however, that Judge Bork's *amicus* briefs do not support the claims being made about his role as Solicitor General.

First, Judge Bork's responses to Senator Hart's questions in the above colloquy are virtually as applicable to *amicus* briefs as they are to briefs on behalf of the government as a party. While the Solicitor General may have somewhat more leeway as an *amicus*, he is still largely the "attorney for the Government" representing the general policies of that government. He is not appointed primarily to expound his own views, even in *amicus* briefs.

Second, Judge Bork's statements to Senator Tunney with respect to *amicus* briefs in the reapportionment area demonstrate that his own views were clearly of secondary significance to his performance as Solicitor General. When asked, "If you had been Solicitor

General, would you have been able to argue for 'one man, one vote?' ", Judge Bork answered:

Would I have been able to? Yes, sir; I would have been able to. I would have advised against it. . . . [If the Attorney General insisted on an argument in favor,] I think I would say to the Attorney General at that time, "I will do so." I would also advise that we explain to the court . . . what some of the problems with that approach may be and what alternative approaches there might be. (Solicitor General Hearings at 13-14.)

Judge Bork was clearly aware from the start, therefore, of the institutional constraints on the expression of his own views as Solicitor General and was quite prepared to be the "attorney for the Government" when the government's position differed from his own.

One clear example of how Judge Bork subordinated his own position to that of the government is *Runyon v. McCrary*, 427 U.S. 160 (1976), a case frequently cited by Judge Bork's supporters as evidence of pro-civil rights predilections. Along with five other officials of the Justice Department, Solicitor General Bork filed an amicus brief in *Runyon*, in which the Supreme Court held that the Civil Rights Act of 1866 prohibited racially discriminatory admissions policies in private schools. Part of that Act prohibits racial discrimination in the making and enforcing of private contracts. The Court's ruling depended on a determination that the Enforcement Clause (Section 2) of the 13th Amendment made this part of the Act constitutional. (427 U.S. at 179.)

Then Solicitor General Bork's support for this case stands in stark contrast to the positions he took **both before and after** he filed the government's amicus brief. In fact, Judge Bork has roundly denounced the use of Enforcement Clause powers to support such congressional action.

As a Yale Law School Professor in 1972, the nominee attacked the ruling in *Katzbach v. Morgan*, 384 U.S. 641 (1966), which authorized Congress's broad use of Enforcement Clause powers in the Voting Rights Act—as "revolutionary constitutional doctrine, for it overturns the relationship between Congress and the Court. . . . It is for the Court to say what constitutional commands mean and to what situations they apply." ("Constitutionality of the President's Busing Proposals," *American Enterprise Institute*, May 1972, at 10.)

Four years after leaving his Justice Department post, then-Professor Bork testified against "decisions that declare a congressional power to define substantive rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments. . . . [It is] my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law." (The Human Life Bill, Hearings at 314.)

In both 1972 and 1981, before and after he was the "attorney for the Government" filing an amicus brief favoring the use of such

powers in *Runyon*, Judge Bork opposed the use of broad Enforcement Clause powers.¹⁰

Insofar as the nominee did have more leeway as Solicitor General when he filed amicus briefs than when he represented the government as a party, the committee finds relevant a study showing that he sided less with the pro-individual rights position than either Erwin Griswold, his Nixon-appointed predecessor, or Wade McCree, his Carter-appointed successor. According to the study, Solicitor General Bork took the pro-rights position in only 40.5 percent of his amicus briefs, compared to 62 percent for Griswold and 79 percent for McCree. (O'Connor, "The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation," *Judicature*, 1983 at 257.)

At the hearings, Judge Bork's supporters repeated their assertion that his record of amicus briefs as Solicitor General closely reflects his prospective inclinations as an Associate Justice. The preceding discussion demonstrates that such an assertion is undercut by Judge Bork's own words, his analyses of the principle underlying a key case and his cumulative amicus record as Solicitor General.

2. Judge Bork's Role As Solicitor General Is Not Particularly Relevant

The above discussion illustrates that Judge Bork's role as Solicitor General was substantially less reflective of his personal or legal viewpoints than his supporters have characterized it. By his own admission before this committee in 1973, he viewed his role as that of "the government's appeal lawyer." Even in submitting amicus briefs when the government was not a party to a suit, he acknowledged that his position was substantially restricted by the views of other Justice Department officials and federal agencies.

Judge Bork's prior and subsequent assessment of the doctrine governing *Runyon v. McCrary*—among the most prominent cases for which the nominee submitted an amicus brief—demonstrate his relatively limited ability to express his own views as Solicitor General. And the conclusions in the *Judicature* study about Judge Bork's cumulative record of amicus briefs filed as Solicitor General certainly suggest that, within that limited scope of discretion open to him, he was not the great friend to individual rights that his supporters would depict.

B. Court of Appeals Judge

The committee has carefully analyzed Judge Bork's record as an intermediate judge on the United States Court of Appeals for the District of Columbia Circuit. Based on this analysis, two conclusions can be drawn. First, the fact that none of Judge Bork's majority opinions has ever been reversed tells us little about the nomi-

¹⁰ It might be contended that *Runyon* was a case that fell within Judge Bork's own rules for acceptable use of the Enforcement Clauses—that is, his view that the clauses simply allow Congress to pass laws giving individuals the right to sue and collect damages for actions that the courts have found to violate the relevant constitutional amendment. The courts have not, however, found that private discrimination in contract-making is barred by the Thirteenth Amendment itself. In *Runyon* the courts did not define private discrimination in the making and enforcement of contracts as a violation of the Thirteenth Amendment; rather, Congress did so. This is precisely "the power to define the substantive content of [constitutional] guarantees themselves," (*Human Life Bill Hearings*, at 314), that Judge Bork has consistently condemned.

nee's suitability for the Supreme Court. Second, several of Judge Bork's opinions demonstrate that he has often taken an activist role and that on occasion he has been insensitive to the claims of minorities.

1. The Lack of Reversals Says Little About the Nominee's Suitability for the Supreme Court

It is true that none of Judge Bork's majority opinions has been reversed by the Supreme Court. More importantly, however, none of Judge Bork's majority opinions has ever been reviewed by the Supreme Court.¹¹ Accordingly, the lack of reversals says little about Judge Bork's suitability for the Supreme Court.

It has been suggested that failure of the Supreme Court to review any of Judge Bork's opinions is itself significant, perhaps implying a judgment by the Supreme Court that his opinions are correct. Such an implication is completely unsupportable. As former Chief Justice Burger testified, "the Court does not explain why it denies review." (Comm. Print Draft, Vol. 2, at 700) In fact, as Professor Judith Resnik said, "[The Supreme] Court has reminded us time and time again that the fact that it does not take a case [for review] has absolutely zero legal weight." (Comm. Print Draft, Vol. 2, at 1247.) Many cases decided by the court of appeals may be in error, but will nevertheless not be changed by the Supreme Court due to the extremely limited capacity of that Court to review cases.

Conceding the fact that the failure of the Court to review a lower court decision means nothing, the final attempt to make something of Judge Bork's appellate record relies upon the number of decisions he has written or participated in that have not been reversed (almost all of them were not reviewed, either). Judge Bork's supporters cite the 110 or so majority decisions he has written and more than 400 decisions he has joined. These statistics are of little utility. In any year, however, the courts of appeals decide about 31,000 cases, while the Supreme Court receives about 5,000 cases for review and renders opinions in only 150 to 170.

In short, the assertions based on statistics do not add up. As Professor Resnik said, "I think we are all too sophisticated here to realize that those numbers cannot tell us very much." (Comm. Print Draft, Vol. 2, at 1246.)

2. As an Intermediate Court Judge, the Nominee Has Been Constitutionally and Institutionally Bound to Follow Supreme Court Precedent

There is yet another reason why, in the committee's view, the statistical summaries of the nominee's Court of Appeals record do not support his elevation to the Supreme Court. As an intermediate court judge, the nominee has been constitutionally and institutionally bound to respect and apply Supreme Court precedent. Indeed, Judge Bork has explicitly recognized that duty in some of

¹¹ Until recently, in all of Judge Bork's majority opinions, review had not been sought by either party or review had been denied. While the Supreme Court has recently granted certiorari in one case in which Judge Bork wrote a majority opinion (*Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), cert. granted sub nom. *Boos v. Barry*, 107 S. Ct. 1282 (1987)), the Court has still never addressed the merits of any of Judge Bork's majority opinions.

his decisions. (See *Franz v. United States*, 712 F.2d 1428 (D.C. Cir. 1983); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).) Thus, Judge Bork's lack of reversals says nothing about his potential for activism if confirmed as an Associate Justice on the Supreme Court, where he would be free of such restraints.

During his testimony, Judge Bork distinguished between the role of a court of appeals judge and that of an Associate Justice. The exchange between Judge Bork and Chairman Biden on this issue is particularly telling:

The CHAIRMAN. As I understand the law . . . , a Supreme Court Justice is not bound as a matter of constitutional law to accepting the precedent that has gone before if he or she has another reason or rationale to disregard [it]. . . .

Judge BORK. That is entirely true. . . .

The CHAIRMAN. But a circuit court judge may not overrule constitutional principles stated by the Supreme Court. Is that not also correct?

Judge BORK. That is also correct. It depends on the application of the principle. (Comm. Print Draft, Vol. 1, at 433.)

Also revealing is the colloquy between Senator Heflin and Judge Bork:

Senator HEFLIN. [A]s an Appeals Judge, of course, some of your own personal views are restricted by certain decisions, and are narrowed to the issue that might be before you.

If you are confirmed and go on to the . . . Supreme Court, while there will be some restrictions, you will be pretty well free to express your own beliefs as you see fit do so on the issue that is before you; is that not true?

Judge BORK. Yes. I would not say I was free in the sense that I was free as a professor; not at all. But obviously, a Supreme Court is freer than a Court of Appeals is. . . . (Comm. Print Draft, Vol. 1, at 680.)

3. Several of Judge Bork's Opinions Show Him to Be a Judicial Activist Who Is Insensitive to the Claims of Minorities and Women

Several of Judge Bork's opinions on the D.C. Circuit show him to be not an apostle of judicial restraint but a marked judicial activist. The Committee believes that a brief recitation of some of these cases illustrate this point, and demonstrate that Judge Bork has often been insensitive to the claims of minority and disadvantaged groups.

a. *Vinson v. Taylor*

Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), *aff'd sub nom. Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986), is the leading case on sexual harassment in the workplace. It is clear from a careful reading that Chief Justice Rehnquist's opinion for a unanimous Supreme Court took a far more sensitive approach to liability for such harassment than did

Judge Bork's dissent from the D.C. Circuit's decision not to rehear the case en banc.

The facts can be briefly summarized. Vinson, a bank teller, claimed that her supervisor insisted that she have sex with him and that she did so because she feared she would be fired if she did not. Vinson claimed that over the next several years, her supervisor made repeated sexual demands, fondled her in front of other employees, exposed himself to her and forcibly raped her on several occasions. The trial court dismissed the claim, saying that their relationship was "voluntary." The D.C. Circuit reversed, holding that if the supervisor made "Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

The D.C. Circuit was asked to rehear the case, and the full court declined. Judge Bork dissented from the denial of the rehearing. Attacking the original decision, Judge Bork argued that "voluntariness" should be a complete defense in a sexual harassment case. He said that "[t]hese rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, to so characterize it." (760 F.2d at 1330.)

Writing for a unanimous Supreme Court, then-Justice Rehnquist held that the correct test for sexual harassment was whether the employer created "an intimidating, hostile, or offensive working environment." On behalf of the Court, he concluded that "[t]he correct inquiry is whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." (106 S. Ct. 2406.)

The *Vinson* decision is fundamentally important on the question of sexual harassment in the workplace, a problem that is all too common. The factual contexts that give rise to such problems, and the Supreme Court's decision, were summarized in a colloquy between Chairman Biden and Professor Barbara Babcock:

Chairman BIDEN. If a woman is in an environment in the workplace where she believes that if she does not have sexual relations with her boss, that she will either not get promoted, or she will be fired, or that things will not go well for her there, and she believes that, and notwithstanding the fact that she is not physically coerced, that she voluntarily goes to bed with her employer at his request, as I read the Supreme Court case, they said that, even though she voluntarily went to bed, there can be circumstances surrounding that incident that in effect made it harassment. Is that correct?

Professor BABCOCK. That is exactly what the Supreme Court unanimously held. (Comm. Print Draft, Vol. 2, at 965.)

Judge Bork's position on liability for sexual harassment was flatly rejected by the Supreme Court. While some witnesses appearing on Judge Bork's behalf, as well as some members of the committee, have argued that Judge Bork and the Supreme Court

adopted essentially the same positions, this claim is inaccurate. The crux of the issue lies in "the difference between what is voluntary and what is welcome." (Comm. Print Draft, Vol 2., at 969.) And the Committee agrees with Judge Hufstedler's assessment of the sharp difference between these two concepts:

I will put it this way. A decision by a dissident who wants to leave the Soviet Union who is told, yes, you can leave; of course, your family must stay. You can say that he stayed voluntarily. Did he stay because he welcomed that choice? That is the problem with respect to the female employee who is put into this sexual harassment situation. And the difference is, Judge Bork treated the issue of voluntariness without recognizing that when the elements of choice are so far reduced, so, you do it, you go to bed with me or you are not going to be promoted, or fired, is my way of saying that is the kind of non-choice you get.

So that that is a very significant difference between the way Judge Bork viewed the situation and the way the Supreme Court did. (Comm. Print Draft, Vol. 2, at 969-70.)

As summarized by Professor Babcock, Judge Bork's position

just fails to recognize the seriousness of sexual harassment as a tremendous burden to women's equality in the workplace. When he talks about voluntariness as a defense, the Supreme Court says it is not voluntariness; it is whether these are unwelcome advances.

This is just a completely different way of looking at it. The Supreme Court does not use words like 'dalliance' when it is talking about sex discrimination. It uses words like allegations of serious criminal offenses. . . . [Judge Bork] was talking about voluntariness. The Supreme Court is talking about whether it is unwelcomed. (Comm. Print Draft, Vol. 2, at 970.)

b. Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.

Judge Bork's opinion in *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Company*, 741 F. 2d 444 (D.C. Cir. 1984), offers a restrictive interpretation of a key Congressional statute. In a telling way, Judge Bork's approach to the case complements his *Vinson* decision in demonstrating his insensitivity to conditions of workplace coercion. It also minimizes the significance of procreative freedoms in our society.

The case arose out of the decision of the American Cyanamid Company to exclude from its Willow Island, W. Va., plant all women of childbearing age unless a woman offered proof of surgical sterilization. (741 F.2d 444, 445.) The company adopted this policy in order to prevent further exposure of women workers to lead, a toxic substance according to Occupational Safety and Health Act regulations. (29 C.F.R. Part 1910.1025; Occupational Exposure to Lead, 43 Fed. Reg. 52952 *et seq.* (Preamble) and 43 Fed. Reg. 54353 *et seq.* (Attachments to the Preamble for the Final

Standard).) The policy was an alternative to compliance with the lead exposure standards.

After five women underwent surgical sterilization to retain their jobs, the Secretary of Labor issued a citation alleging a violation of the "general duty clause" of the Occupational Safety and Health Act. This clause commands that employers "furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are likely to cause death or serious physical harm to his employees." (29 U.S.C. Section 654(a)(1).) The "general duty" clause furthers OSHA's policy "to assure so far as possible every working man and woman in the nation safe and healthy working conditions. . . ." (29 U.S.C. Section 651(b).)

American Cyanamid attempted to comply with the general duty clause by forcing some of its women workers to submit to surgical sterilization or be fired. This policy affected women between the ages of 16 and 50 years. [741 F.2d 444, 446].

In his opinion for the court, Judge Bork upheld the decision of the Occupational Safety and Health Review Commission that the policy was not covered under OSHA, so that the employees had no rights under the Act to prevent implementation of the policy.

Judge Bork's opinion failed to mention that a previous decision of the D.C. Circuit suggested that under OSHA the exclusion of fertile women from the workplace might be actionable. (See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1238 n. 74 (D.C. Cir. 1980).) In *Marshall*, the court wrote: "We think that fertile women can find statutory protection from such discrimination in the OSH Act's own requirement that OSHA standards ensure that 'no employee will suffer material impairment of health. . . .'" (*Id.*)

In his opinion, Judge Bork implied that the harm from lead exposure was a risk faced only by women workers and developing fetuses. In fact, OSHA found that "[m]ale workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy." (29 C.F.R. Section 1910.1025 (1978) at 815; see also Attachments to Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 54421, 54424 (1978).) These findings were upheld by the court in *Marshall*. (647 F.2d at 1256-58.)

Judge Bork's opinion also suggests that the company had no alternative but to dismiss women who chose not to be sterilized. (741 F.2d at 450.) And as Judge Bork testified in response to questions from Senator Hatch: "[T]his was a case with no satisfactory solution for anybody. I mean there was nothing to do. There was no satisfactory way to solve it." (Comm. Print Draft, Vol. 1, at 714.)

The record of this case shows, however, that a number of alternatives were proposed by the Union petitioners and the Secretary of Labor in the proceedings below and that the Oil, Chemical and Atomic Workers (OCAW) had asked the court to permit fact-finding on the question of whether there were alternatives to the sterilization policy. In its brief, the union stated:

OCAW and the Secretary [of Labor] offered in the Commission Proceedings to present evidence to establish that Cyanamid could have provided protection to fetuses without requiring the surgical sterilization of employees, and they

sought discovery to refute Cyanamid's opposing contentions. But because the ALJ [administrative law judge], at Cyanamid's urging, disposed of the case by adopting the threshold position that the sterilization rule wasn't a hazard cognizable under the Act, a factual record was not made on this seriously disputed point. (Comm. Print, Vol. 3, at 1630-31.)

Judge Bork's opinion precluded fact-finding on this central issue—whether there were alternatives to the policy adopted by American Cyanamid.

Judge Bork's opinion and his testimony before the Committee illustrated his failure to appreciate the coercive nature of the "choice" American Cyanamid presented to its women workers. When he testified before this Committee, Judge Bork said the company "offered a choice to the women. Some of them, I guess, did not want to have children." (Comm. Print Draft, Vol. 1, at 448.) Later he said that "I suppose the five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them" (Comm. Print Draft, Vol. 1, at 450.). But the telegram and letter sent to this Committee by Betty Riggs—a woman who submitted to sterilization rather than lose her job—highlighted Judge Bork's insensitivity to the dilemma that confronted these women.

This discussion of "choice" is reminiscent of Judge Bork's use of "voluntary" to describe situations of sexual harassment in the workplace. (See Section (a), *supra*, discussing *Vinson*.) In a telegram received by Senators Metzenbaum and Biden, Betty Riggs, a woman who submitted to sterilization rather than lose her job, told the story of her choice:

I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired. Only a judge who knows nothing about women who need to work could say that. (Comm. Print Draft, Vol. 1, at 539.)

In her subsequent letter, dated September 28, 1987, Ms. Riggs spoke clearly of economic coercion and humiliation:

I had surgery because I had to have the job and felt I had no choice. If I lost my job I would have lost my home and I also needed it to help support my parents, my father was totally blind and my mother had emphysema. . . .

During this time we were harassed, embarrassed, and humiliated by some supervisors and some fellow workers. They referred to us like animals, such as dogs being spayed or neutered. They told us we were branded for life.

Professor Kathleen Sullivan explained the problems with Judge Bork's opinion:

Judge Bork did not see the fundamental right to make our own decisions about procreation, whether we are going to have children . . . , as creating a special need for sensitivity in this case. He did not see that fundamental liberty

to procreate as demanding a reading of the statute that would have protected these women.

After all, getting sterilized is not just a safety precaution like putting on a gas mask when there are fumes in the factory or using an extra ladder when you are climbing up a height. Getting sterilized, as Justice Douglas said for a unanimous Court, in *Skinner v. Oklahoma* in the 1940's [provides] . . . no redemption. . . . Once sterilized, there is no redemption. And I think finally, Senator Metzenbaum, to see it as a choice, an act of free will—be sterilized or feed my children—I think we all know that is not a truly free choice. . . .

All we can say from *Cyanamid* . . . is that he was not sensitive in his reading of the statute to the importance of our powers of childmaking, our right to procreate, when he read that statute, and that is a sensitivity I would hope that a Justice of the Supreme Court would have. (Comm. Print Draft, Vol. 3, at 1624.)

c. *Bartlett v. Bowen*

In *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir.), reh. denied, 824 F.2d 1240 (D.C. Cir. 1987), Judge Bork adopted in dissent a novel and unprecedented approach to the doctrine of sovereign immunity (pursuant to which a governmental unit can be sued only if it consents). The plaintiff, Josephine Neuman, a member of the Christian Science faith, entered a Christian Science nursing facility and received care until she died. Medicare refused to pay the \$286 for the nursing home care. Ms. Neuman's sister, Mary Bartlett, sued on the ground that the refusal to provide benefits violated First Amendment rights of the free exercise of religion. The Medicare Act, permitted "judicial review" of a "final decision" of the Secretary of the Department of Health and Human Services only if the amount in controversy is \$1,000 or more. The issue in *Bartlett* was whether that statute barred federal court review of the First Amendment claim.

The majority held that the federal courts could review the constitutional claim. Judge Bork dissented and, in the words of the majority, "relie[d] on an extraordinary and wholly unprecedented application of the notion of sovereign immunity to uphold the Act's preclusion of judicial review." (*Id.* at 703.) The majority said that Judge Bork took "great pains to disparage" a leading Supreme Court decision, which suggested that Congress could not preclude review, as Judge Bork would have it, of constitutional claims. And, continued the majority, Judge Bork "ignore[d] clear precedent" from his own Circuit that followed the Supreme Court decision and made "no mention of the Supreme Court's very recent affirmation of [the decision]—using exactly the same language." (*Id.* at 702-03.)

The majority concluded that Judge Bork's view that Congress may not only legislate, but also may "judge the constitutionality of its own actions," would destroy the "balance implicit in the doctrine of separation of powers." (*Id.* at 707.) Thus, according to the majority, Judge Bork's

sovereign immunity theory in effect concludes that the doctrine . . . trumps every other aspect of the Constitution. According to [Judge Bork], neither the delicate balance of power struck by the Framers among the three branches of government nor the constitutional guarantee of due process limits the government's assertion of immunity. Such an extreme position cannot be maintained. (*Id.* at 711.)

As Professor Judith Resnik concluded, Judge Bork "deployed the doctrine of sovereign immunity in an innovative and unusual manner. . . ." (Resnik statement, Comm. Print Draft, Vol. 2, at 1157-58.) The Committee shares Professor Resnik's view that *Bartlett* is an "example of Judge Bork's efforts to insulate the government from having to respond to its citizens' allegations of illegal behavior." (*Id.* at 1158.)

d. *Dronenburg v. Zech*

Another example of Judge Bork's activist approach is *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). Judge Bork's majority opinion affirmed the dismissal of the Navy's discharge of a nine-year veteran for engaging in consensual homosexual activity. After a lengthy recitation of the Supreme Court's line of privacy decisions for creating what he deemed as "new rights," (*Id.* at 1395), Judge Bork claimed that he could find no "explanatory principle" in them, and then argued that lower federal courts were required to give very narrow readings to them because the courts "have no guidance from the Constitution or . . . from articulated Supreme Court principle." (*Id.* at 1396.)

Judge Bork's theory of lower court jurisprudence in *Dronenburg*—a theory that has never been expressed or endorsed by the Supreme Court—as well as his criticism of the privacy decisions, led four members of the D.C. Circuit to caution Judge Bork, in their dissent from the denial of the petition for rehearing en banc, about the proper role of the court:

[Judge Bork's] extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court. . . . **We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint.** Regardless whether it is the proper role of lower courts to 'create new constitutional rights,' surely it is not their function to conduct a general spring cleaning of constitutional law. **Judicial restraint begins at home.** (746 F.2d 1579, 1580; emphasis added.)

* * * * *

Judge Bork's supporters have made much of his Solicitor General and Court of Appeals records. The committee finds little in those records that mitigate the objections to his confirmation that have been outlined in other sections of this report. Indeed, parts of those records confirm some of those objections.

X. JUDGE BORK'S SO-CALLED "CONFIRMATION CONVERSION:" THE WEIGHT THE SENATE MUST GIVE TO NEWLY ANNOUNCED POSITIONS

As Senator Leahy has said, Judge Bork throughout the hearings told the committee many things "that he has never told anyone else before—at least not in public—about his approach to fundamental constitutional issues." (Statement of Senator Leahy, September 30, 1987, S 13128, S 13129.) Much of has been made of this so-called "confirmation conversion."

In the committee's view, the issue is not whether Judge Bork was candid in those aspects of his sworn testimony that seem to contradict many of his previously announced positions. In Senator Specter's words, "it is not a matter of questioning his credibility or integrity, or his sincerity in insisting that he will not be disgraced in history by acting contrary to his sworn testimony. . . ." (Specter statement, Congressional Record, Oct. 1, 1987, S 13319.) Rather, "the real issue is what weight the Senate should give to these newly expressed views," (Leahy Statement at 6), in light of Judge Bork's "judicial disposition in applying principles of law which he has so long decried." (Specter statement, Cong. Record, S 13319.)

The Committee has concluded that Judge Bork's newly announced positions are not likely fully to outweigh his deeply considered and long-held views. The novelist William Styron cut to the heart of this matter when he said that the Senate must decide whether Judge Bork's new positions reflect "a matter not of passing opinion but of conviction and faith." (Comm. Print Draft, Vol. 2, at 585.) "Measured against this standard, Judge Bork's testimony . . . mitigates some of his previous statements, but does not erase them from the record which the Senate must consider." (Leahy statement, Cong. Record at S 13129.) Underscoring this conclusion is, in Senator Heflin's words, "the absence of writings or prepared speeches which recite a change in his earlier views and the reasons for such change." (Heflin Closing Statement at 4.) In the end, the Committee is concerned that Judge Bork will bring to the "constitutional controversies of the 21st century" the conviction and faith of his long-held judicial philosophy and not that of his newly announced positions.

There were three principal changes in positions that Judge Bork announced for the first time, at least publicly, at the hearings. These related to: (1) the Equal Protection Clause of the Fourteenth Amendment and gender discrimination, (2) dissident political speech under the First Amendment; and (3) First Amendment protection for artistic expression.

At his confirmation hearings, Judge Bork for the first time said that he would apply the Equal Protection Clause to women pursuant to a "reasonable basis" standard. As discussed in Part Three, Section III, *supra*, this position contrasts markedly with Judge Bork's historical approach to this issue. The committee agrees with Senator Specter's statement that there is

substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless speci-

fied or are within original intent. (Specter statement, Cong. Record, S 13318.)

And, as Senator Leahy concluded:

Based on the record before the Senate, even including the new perspective provided by Judge Bork's own testimony, this nominee's conception of the Equal Protection Clause is not broad and dynamic enough to reassure me that as a Justice of the Supreme Court, he will respond to these claims in the way the American people have a right to expect. (Leahy statement, Cong. Record at S 13132.)

On the question of dissident political speech—that is, speech that advocates the violation of law—Judge Bork also announced a dramatic change in position. As discussed in Part Three, Section IV(D)(1), *supra*, Judge Bork had, prior to the hearings, consistently rejected the “clear and present danger” test even though a unanimous Supreme Court had accepted it for years. During the hearings, Judge Bork took inconsistent positions on this issue, but ultimately said that he accepted the Supreme Court's formulation as “settled law.” Again, the statements of Senators Specter and Leahy are particularly cogent. Said Senator Specter:

I have substantial doubt about Judge Bork's application of [the clear and present danger] standard to future cases involving different fact situations where he retains his deep-seated philosophical objections. (Specter statement, Cong. Record at S 13319.)

Senator Leahy observed:

[I]n the end, I am not persuaded that Justice Bork would be an energetic and effective guardian of this most basic of our constitutional freedoms. Belated acceptance of these well-established principles does not match what we expect of a Supreme Court Justice. (Leahy statement, Cong. Record at S 13131.)

The third principal area in which Judge Bork modified his views is the area of artistic expression. Prior to the hearings, Judge Bork had expanded his concept of protected speech under the First Amendment from his original and somewhat radical position set forth in his *Indiana Law Journal* article. He had still seemed to maintain, however, that speech must relate in some way to the political process. By the time of his testimony, Judge Bork accepted the proposition that speech should be protected regardless of its lack of relationship to the political process. He accepted, in other words, “a consensus that has existed for decades.” (Leahy statement, Cong. Record at S 13130.) As Senator Leahy concluded:

While this testimony was welcome, it still must be read against the background of Judge Bork's prior statements on the issue. . . . The over-all picture presented by Judge Bork's free speech decisions and his writings on the subject belies the extravagant claim made by some of the proponents of this nomination that he is ‘at the forefront’ of modern free speech jurisprudence. At best he is some-

where in the pack and running to catch up. (*Id.* at S 13130, S 13131.)

Any discussion of the so-called "confirmation conversion" would not be complete without mention of the principal area in which Judge Bork did not change his views. On the related questions of liberty, unenumerated rights and the right to privacy, Judge Bork's views have not changed in any substantial degree. He still challenges the role of the Supreme Court in defining liberty; he still challenges the legitimacy of *Griswold* and its progeny; and he still maintains that the people of the nation have only those rights that are specified in the text of the Constitution.

The hearing record is, therefore, quite clear. In some areas, Judge Bork has come to rest at a point near the consensus that was reached by the Supreme Court and by most legal scholars almost a quarter-century ago. In other areas, Judge Bork's views have not changed at all, and place him at odds with every Supreme Court Justice, past or present. Once again, Senator Leahy's words reflect the conclusion of the Committee:

This . . . shows that Judge Bork's views are now different from some of the more isolated positions he previously sought to defend. But it also shows that, at this point in his long career, he still does not demonstrate a passion for vindicating the individual rights of Americans that matches his passion for a rigorous and coherent legal theory of the Constitution. (Leahy statement, Cong. Record at S 13129.)

And in the words of Senator Heflin:

A life-time position on the Supreme Court is too important a risk to a person who has continued to exhibit—and may still possess—a proclivity for extremism in spite of confirmation protestations. (Heflin closing statement at 6.)

PART FOUR: CONCLUSION

The hearings before this committee on the nomination of Robert H. Bork have been about what the Framers called "free government." And free government, as one witness put it, "is a complicated blend of principle and preference." (Written statement of Owen Fiss, Comm. Print Draft, Vol. 2, at 1071.) Through these hearings, millions of Americans have been reminded that free government "empowers the majority and makes it the touchstone of legitimacy, but at the same time it protects individuals, minorities, and powerless groups in our society against laws and practices that are sometimes demanded by a majority but which might be deeply regretted by the people at more reflective moments." (*Id.*)

Two hundred years ago, the founders of this great Nation created a Constitution for their heirs and descendants, enabling them continually to refine the balance between principle and preference. Our Constitution has scarcely more than 5,000 words. But those words have enabled this Nation to flourish for two centuries, and they now lead us into a third.

At the same time, the Constitution's words alone have never been deemed sufficient to gain its ends. As John Randolph reminded the new nation, "[y]ou may cover whole skins of parchment with limitations, but power alone can limit power." (W.C. Bruce, *John Randolph of Roanoke* (1922), Vol. II at 211.) Faithful to this mandate, the Supreme Court has been the ultimate bulwark of protection when the majority has attempted to impose its preference upon the fundamental principles of the Constitution—when it has attempted, in other words, to channel the force of government to override the rights of the individual. In the words of former Congresswoman Barbara Jordan, "[t]he Supreme Court will throw out a lifeline when the legislators and the governors and everybody else refuse[s] to do so." (Comm. Print Draft, Vol. 1, at 795.) In large part, because of the Supreme Court, "[w]e are held together as a nation by a body of constitutional law constructed on the premise that individual dignity and liberty are the first principles of our society." (Coleman testimony, Comm. Print Draft, Vol. 1, at 740.)

Judge Bork's constitutional philosophy places him at odds with this history and tradition. As Judge Hufstedler said:

In examining Judge Bork's record as an academician, as a high-ranking member of the Executive Branch of the federal government, and as a judge, the evidence discloses his quest for certitudes to resolve the ambiguities of the Constitution and of the Supreme Court's role in constitutional adjudication, and an effort to develop constitutional litmus tests to avoid his having to confront the grief and the un-

tidiness of the human condition. (Comm. Print Draft, Vol. 2, at 921.)

Several examples illustrate Judge Hufstедler's point. Judge Bork reads the Constitution not with Judge Learned Hand's "spirit of liberty" (Kurland testimony, Comm. Print Draft, Vol. 3, at 1388), but in a mechanical way, as if it were a rigid legal code. It is one thing to accept as "settled law" decisions that have long been incorporated into the fabric of American life, years after the passions of battle have cooled. But the acid test of commitment to constitutional liberties comes when those liberties are under their greatest threat. Had Judge Bork's views been the governing rule on the Supreme Court at the critical moments of the last generation, principles that most Americans have come to accept would have been rejected. There would be no right to privacy. There would be no substantive content to the liberty clause of the Fourteenth Amendment. William Coleman spoke eloquently when he said:

There . . . [is a] simple proposition[,] and this is not speaking as a black person. This is speaking as an American. That one of the greatest heritage is the liberty and the privacy . . . the right to marry, you name them. This Judge reads them out of the Constitution. He has done it in his speeches before. He has done it since [he has been] on the bench. (Comm. Print Draft, Vol. 1, at 769.)

And, as John Hope Franklin told us, our civil rights landscape would be dramatically different:

Nothing in Judge Bork's record suggests to me that had he been on the Supreme Court at an earlier date, he would have had the vision and the courage to strike down a statute requiring the eviction of a black family from a train for sitting in the so-called white coach, or the rejection of a black student at a so-called white state university; or the refusal of a white restaurant owner to serve a black patron. As a professor he took a dim view of the use of the Commerce Clause to protect the rights of individuals to move freely from one place to another; or to uphold their use of public accommodations. (Comm. Print Draft, Vol. 2, at 719.)

It is often stated that America's strength lies in being a government of laws and not of men. For such a government to endure, interpretation of our most fundamental law must comprehend the lives of the people and accord with their deepest values. The Supreme Court sets the terms of that interpretation, and its members must view the forum as far more than what the nominee has termed an "intellectual feast." Justices of the Supreme Court hold the solemn charge to embody justice, and to unleash or resolve the aspirations and grievances of a nation. Nor can constitutional interpretation be based simply on an "understand[ing of] constitutional governance," as Judge Bork also has suggested. (Comm. Print Draft, Vol. 1, at 720.) To update Justice Holmes' reminder many decades ago, the words of the Constitution

have called into being a life the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken [two] centur[ies] and cost their successors much sweat and blood to prove that they created a nation. The case[s] before us must be considered in the light of our whole experience and not merely in that of what was said [two] hundred years ago. (*Missouri v. Holland*, 252 U.S. 416, 433 (1920).)

This broad context for the justices' role frames, in turn, the question for this committee. That question was put well by Secretary Coleman:

In this day and age, can we really take the risk of nominating to the Supreme Court a man who fails to recognize the fundamental rights of privacy and substantive liberty . . . which are already imbedded in the very fiber of our Constitution . . . [?] (Comm. Print Draft, Vol. 1, at 740.)

The nation cannot take this risk. The positions adopted by Judge Bork at critical moments of decision bespeak a perilous inclination for one who would guide our nation's future. The constitutional problems of the next generation will take new and unexpected forms, but they will juxtapose the same values of liberty and sovereignty, of preference and principle, that antedate the birth of our Constitution. Judge Bork's confined vision of the Constitution and of the task of judging itself carries too great a risk of disservice to future national needs and distortion of age-old constitutional commitments to permit his confirmation.

The hearings were, for this committee, a return to first principles: an exploration of the role of the Constitution and the Supreme Court in the government fashioned by our founders 200 years ago. When the Framers, in Madison's phrase, "reared the fabrics of government which have no models on the face of the globe," they passed to their descendants the blessings and burdens of free government. Under our living Constitution, the Supreme Court has the continuing task of harmonizing the liberty and popular sovereignty, the preference and principle, that comprise free government. Dean Robert Bennett described the process of this task well when he said:

Ours is one in which sensitive questions of application constantly arise that cannot be solved by any easy reference to constitutional language, to original intention or to any other simple key to constitutional meaning. They must be solved with the historical evidence as the starting point, and with heavy reliance on the good sense and restraint of the judicial branch, guided in the time-honored fashion of the common law by the accumulated wisdom of a system of precedent. (Bennett statement, Comm. Print Draft, Vol. 2, at 1236.)

By this process, the Supreme Court acts to define our lasting values as a people. In exercising powers of advice and consent for Justices of the Supreme Court, the Senate must speak for generations yet unborn, whose lives will be shaped by the fundamental

principles that those Justices enunciate. As we face that task here today, we keep faith with our forefathers' bold experiment by reaffirming for **our** time their promise that liberty would be the American birthright for **all** time.

APPENDIX ONE

WITNESS LIST

Nomination of Judge Robert H. Bork to be Associate Justice
of the Supreme Court

10:00 A.M.

Tuesday, September 15
Senate Caucus Room
325 Russell Building

(all pro-bork)
Former President Gerald Ford

Minority Leader Robert Dole

Senator John Danforth

Congressman Hamilton Fish

Judge Robert Bork

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITNESS LIST
HEARINGS ON THE NOMINATION OF JUDGE ROBERT BORK TO BE
ASSOCIATE JUSTICE OF THE SUPREME COURT

MONDAY, SEPTEMBER 21, 1987

WILLIAM COLEMAN, PARTNER, O'MELVENY & MYERS; FORMER SECRETARY OF TRANSPORTATION; CHAIRMAN OF THE BOARD OF NAACP LEGAL DEFENSE FUND. (ANTI-BORK)

ANDREW YOUNG, MAYOR, ATLANTA, GEORGIA; FORMER MEMBER OF CONGRESS. (ANTI-BORK)

BARBARA JORDAN, PROFESSOR, UNIVERSITY OF TEXAS, AUSTIN; FORMER MEMBER OF CONGRESS; FORMER MEMBER TEXAS SENATE. (ANTI-BORK)

BURKE MARSHALL, PROFESSOR, YALE UNIVERSITY LAW SCHOOL; FORMER ASSISTANT ATTORNEY GENERAL CIVIL RIGHTS DIVISION; FORMER VICE PRESIDENT AND GENERAL COUNSEL IBM; PARTNER COVINGTON & BURLING; (ANTI-BORK)

NICHOLAS KATZENBACH, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; FORMER ATTORNEY GENERAL. (ANTI-BORK)

EDWARD LEVI, FORMER ATTORNEY GENERAL. (PRO-BORK)

WILLIAM ROGERS, FORMER ATTORNEY GENERAL. (PRO-BORK)

WILLIAM FRENCH SMITH, FORMER ATTORNEY GENERAL. (PRO-BORK)

WILLIAM SAXBE, FORMER ATTORNEY GENERAL (PRO-BORK) - DID NOT APPEAR

AMERICAN BAR ASSOCIATION

HAROLD TYLER, CHAIRMAN, STANDING COMMITTEE ON THE FEDERAL JUDICIARY OF THE AMERICAN BAR ASSOCIATION.

ROBERT FISKE, FORMER CHAIRMAN, STANDING COMMITTEE ON THE FEDERAL JUDICIARY OF THE AMERICAN BAR ASSOCIATION.

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WITNESS LIST

TUESDAY, SEPTEMBER 22, 1987 (CONTINUED)

LLOYD CHILDS - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

WILLIAM C. CROFT - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

DAVID J. DUFFY - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

JOHN J. DUFFY - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

JOHN J. DUFFY - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

JOHN J. DUFFY - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

JOHN J. DUFFY - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

DAVID J. DUFFY - President, National Crime & Terrorism
Council, 1000 Pennsylvania Avenue, Washington, D.C. 20004

LARRY BITTICK - Executive Director, National Sheriffs Association.

JOHN DUFFY - Chairman, Law and Legislative Committee,
National Sheriffs Association, (DID NOT APPEAR)

JOHNNY HUGHES - Director, National Troopers Coalition.

FRANK CARRINGTON - Executive Director,
Victims' Assistance Legal Organization.

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITNESS LIST
HEARINGS ON THE NOMINATION OF JUDGE ROBERT BORK TO BE AN
ASSOCIATE JUSTICE OF THE SUPREME COURT

TUESDAY, SEPTEMBER 22, 1987

ALBERT TROPE - PROFESSOR OF CONSTITUTIONAL LAW,
HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

JOHN TROPE

JOHN TROPE - FORMER DEPUTY ATTORNEY GENERAL, NEW YORK STATE

ROBERT TROPE - PROFESSOR,
UNIVERSITY OF SOUTHERN CALIFORNIA

THOMAS TROPE - PROFESSOR, STANFORD LAW SCHOOL

THOMAS TROPE - PROFESSOR, HARVARD LAW SCHOOL

JOHN TROPE - ADJUNCT PROFESSOR OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA

FIRST AMENDMENT SOCIETY (AMT-LEON)

LEE BOLLINGER - DEAN, UNIVERSITY OF MICHIGAN LAW SCHOOL

WILLIAM STYRON - AUTHOR

ROBERT RAUSCHENBERG - ARTIST

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITNESS LIST

HEARINGS ON THE NOMINATION OF JUDGE ROBERT BORK TO BE AN
ASSOCIATE JUSTICE OF THE SUPREME COURT

WEDNESDAY, SEPTEMBER 23, 1982

~~CHIEF JUSTICE WARREN E. BURGER (MODERATOR)~~

~~SEN. JAMES EASTLAND~~

~~WILLIAM F. FLETCHER - PROFESSOR OF HISTORY,
UNIVERSITY OF MICHIGAN, ANN ARBOR~~

~~FRANK J. FORD JR. - PROFESSOR OF HISTORY, THE UNIVERSITY~~

~~OF MICHIGAN, ANN ARBOR~~

~~LEON DITLER - SENIOR ATTORNEY, SENATE STAFFING
SOURCE, TO PRESIDENT JAMES EARL RAY~~

FAUL PROJECTION PANEL (ANTI-BORK) - MOVED TO 9/25

SHIRLEY HUFSTEDLER - PARTNER, HUFSTEDLER, MILLER,
CARLSON & BLANDFELY; FORMER SECRETARY OF EDUCATION;
FORMER JUDGE, 9TH CIRCUIT COURT OF APPEALS.

BARBARA BABCOCK - PROFESSOR, STANFORD UNIVERSITY LAW SCHOOL;
FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION.

SYLVIA LAW - PROFESSOR, NEW YORK UNIVERSITY LAW SCHOOL.

WENDY WILLIAMS - PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER.

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITNESS LIST

~~REDACTED~~ NOMINATION OF JUDGE ROBERT BORK TO BE AN
ASSOCIATE JUSTICE OF THE SUPREME COURT.

~~REDACTED~~ Y, SEPTEMBER 23, 1987 (CONTINUED)

PROSECUTORS PANEL (PRO-BORK)

~~REDACTED~~ JES THOMPSON - GOVERNOR OF ILLINOIS.

~~REDACTED~~ DISTRICT ATTORNEY OF LAKE COUNTY, ILL.
~~REDACTED~~ THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION.

~~REDACTED~~ DISTRICT ATTORNEY OF SUFFOLK COUNTY, MASS.
~~REDACTED~~ THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION.
~~REDACTED~~ (HEAR)

~~REDACTED~~ RNEY AT LAW, PHOENIX ARIZONA. (ANTI-BORK)

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITNESS LIST

HEARINGS ON THE NOMINATION OF JUDGE ROBERT BORK TO BE
ASSOCIATE JUSTICE ON THE SUPREME COURT

FRIDAY, SEPTEMBER 25, 1987

BAR LEADERS PANEL

(ANTI-BORK)

CHESTERFIELD SMITH - PARTNER, HOLLAND & KNIGHT;
FORMER PRESIDENT OF THE ABA.

ROBERT MESERVE - COUNSEL, PALMER & DODGE;
FORMER PRESIDENT OF THE ABA.

ROBERT KAUFMAN - PARTNER, PROSKAUER, ROSE, GOETZ & MENDELSON;
PRESIDENT OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

(PRO-BORK)

THOMAS SOWELL - FELLOW, HOOVER INSTITUTE.

EQUAL PROTECTION PANEL

(ANTI-BORK)

SHIRLEY HUFSTEDLER - PARTNER, HUFSTEDLER, MILLER,
CARLSON & BEARDSLEY; FORMER SECRETARY OF EDUCATION;
FORMER JUDGE, 9TH CIRCUIT COURT OF APPEALS.

BARBARA BABCOCK - PROFESSOR, STANFORD LAW SCHOOL.

SYLVIA LAW - PROFESSOR, NEW YORK UNIVERSITY LAW SCHOOL.
 WENDY WILLIAMS - PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER.

ACADEMIC PANEL

(PRO-BORK)

DANIEL MEADOR - PROFESSOR, UNIVERSITY OF VIRGINIA LAW SCHOOL.
 GEORGE PRIEST - PROFESSOR, YALE UNIVERSITY LAW SCHOOL.
 JOHN SIMON - PROFESSOR, YALE UNIVERSITY LAW SCHOOL.
 RONALD ROTUNDA - PROFESSOR, UNIVERSITY OF ILLINOIS LAW SCHOOL.
 FORREST McDONALD - PROFESSOR OF HISTORY, UNIVERSITY OF ALABAMA.

ACADEMIC PANEL

(ANTI-BORK)

ROBERT BENNETT - DEAN, NORTHWESTERN UNIVERSITY LAW SCHOOL.
 PAUL GEWIRTZ - PROFESSOR, YALE UNIVERSITY LAW SCHOOL.
 OWEN FISS - ALEXANDER BICKEL PROFESSOR OF PUBLIC LAW,
 YALE UNIVERSITY LAW SCHOOL.
 TOM GREY - PROFESSOR, STANFORD UNIVERSITY LAW SCHOOL.
 JUDITH RESNIK - PROFESSOR, UNIVERSITY OF
 SOUTHERN CALIFORNIA SCHOOL OF LAW.

BAR LEADERS PANEL

(PRO-BORK)

JOHN SHEPHERD - PARTNER, SHEPHERD, SAUDBURG & PHOENIX,
 ST. LOUIS, MO.; FORMER PRESIDENT AMERICAN BAR ASSOCIATION.
 WALLACE RILEY - PARTNER, RILEY & ROUNELL, DETROIT, MI;
 FORMER PRESIDENT AMERICAN BAR ASSOCIATION.
 CHARLES S. RHYNE - FORMER PRESIDENT AMERICAN BAR ASSOCIATION

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITNESS LIST

HEARINGS ON THE NOMINATION OF JUDGE ROBERT BORK TO BE AN
ASSOCIATE JUSTICE OF THE SUPREME COURT

MONDAY, SEPTEMBER 28, 1987

EXECUTIVE POWER PANEL (ANTI-BORK)

SENATOR THOMAS EAGLETON
CASS SUNSTEIN - PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL

GRIFFIN BELL (PRO-BORK) - Former U.S. Attorney General

PHILIP KURLAND - PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL
(ANTI-BORK)

JUSTICE DEPARTMENT COLLEAGUES PANEL (PRO-BORK)

A. RAYMOND RANDOLPH - FORMER DEPUTY SOLICITOR GENERAL
STUART SMITH - FORMER DEPUTY SOLICITOR GENERAL
JEWEL LAFONTANT - FORMER DEPUTY SOLICITOR GENERAL
GOVERNOR RICHARD THORNBURGH - FORMER UNITED STATES ATTORNEY

REVEREND KENNETH DEAN - FIRST BAPTIST CHURCH, ROCHESTER, N.Y.
(ANTI-BORK)

ACADEMIC PANEL (PRO-BORK)

PAUL BATOR - PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL
HENRY MONAGHAN - PROFESSOR, COLUMBIA UNIVERSITY SCHOOL OF LAW
LILLIAN RIEMER BEVIER - PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL
OF LAW
LEO LEVIN - PROFESSOR, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
DALLIN H. OAKS - FORMER PROFESSOR, UNIVERSITY OF CHICAGO LAW
SCHOOL; FORMER JUSTICE, UTAH SUPREME
COURT
JOHN BAKER - PROFESSOR, INDIANA UNIVERSITY SCHOOL OF LAW
- DID NOT APPEAR

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WITNESS LIST

HEARINGS ON THE NOMINATION OF JUDGE ROBERT BORK TO BE AN
ASSOCIATE JUSTICE ON THE SUPREME COURT

TUESDAY, SEPTEMBER 29, 1987

PRIVACY PANEL (ANTI-BORK)

HERMA HILL KAY - PROFESSOR, BOALT HALL LAW SCHOOL, UNIVERSITY OF
CALIFORNIA, BERKELEY
KATHLEEN SULLIVAN - PROFESSOR, HARVARD LAW SCHOOL
DAVID RICHARDS - PROFESSOR, NEW YORK UNIVERSITY LAW SCHOOL

ELLIOT RICHARDSON - PARTNER, MILBANK, TWEED, HADLEY, & MCCLOY, NEW
YORK; FORMER ATTORNEY GENERAL (PRO-BORK)

WATERGATE PANEL (ANTI-BORK)

HENRY RUTH - COUNSEL, UNISYS;
FORMER DEPUTY WATERGATE SPECIAL PROSECUTOR
GEORGE FRAMPTON - PRESIDENT, THE WILDERNESS SOCIETY;
FORMER ASSISTANT WATERGATE SPECIAL PROSECUTOR

LAW SCHOOL DEANS PANEL (PRO-BORK)

TERRANCE SANDALOW - FORMER DEAN, UNIVERSITY OF MICHIGAN LAW SCHOOL
STEVEN FRANKINO - DEAN, VILLANOVA; FORMER DEAN, CATHOLIC
UNIVERSITY LAW SCHOOL
MAURICE HOLLAND - DEAN, UNIVERSITY OF OREGON SCHOOL OF LAW
RONALD DAVENPORT - FORMER DEAN, DUQUESNE LAW SCHOOL
EUGENE ROSTOW - PROFESSOR EMERITUS, FORMER DEAN, YALE LAW SCHOOL
THOMAS MORGAN - DEAN, EMORY UNIVERSITY LAW SCHOOL
GERHARD CASPER - DEAN, UNIVERSITY OF CHICAGO LAW SCHOOL

ANTI-TRUST PANEL (ANTI-BORK) MOVED TO 9/30

ROBERT PITOFKY - DEAN, GEORGETOWN UNIVERSITY LAW CENTER
ROBERT ABRAMS - ATTORNEY GENERAL, NEW YORK
CHARLES BROWN - ATTORNEY GENERAL, WEST VIRGINIA

LAWYERS PANEL (PRO-BORK)

HOWARD KRANE - PARTNER, KIRKLAND & ELLIS, CHICAGO
 KENNETH BIALKIN - PARTNER, WILLKIE FARR & GALLAGHER, NEW YORK
 (MOVED TO 9/30)
 REED CARLOCK - PARTNER, RYLEY, CARLOCK & APPLEWHITE,
 PHOENIX

WITNESS LIST

TUESDAY, SEPTEMBER 29, 1987

ANTITRUST PANEL (PRO-BORK)

THOMAS KAUPER - PROFESSOR, UNIVERSITY OF MICHIGAN LAW SCHOOL;
FORMER ASSISTANT ATTORNEY GENERAL, ANTITRUST
DIVISION

DONALD BAKER - SUTHERLAND ASBILL & BRENNAN, WASHINGTON, D.C.
D.C.; FORMER ASSISTANT ATTORNEY GENERAL, ANTITRUST
DIVISION

PHIL NEAL - PARTNER, NEAL, GERBER, EISENBERG, CHICAGO - DID NOT
APPEAR

JAMES HALVERSON - PARTNER, SHEARMAN & STERLING, NEW YORK;
FORMER DIRECTOR, FEDERAL TRADE COMMISSION BUREAU
OF COMPETITION

PHILLIP AREEDA - PROFESSOR, HARVARD LAW SCHOOL

THREE MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS WILL APPEAR AFTER
THE LUNCH BREAK - CONYERS, DYMALLY AND FAUNTROY (ANTI-BORK)

WITNESS LIST
 SENATE JUDICIARY COMMITTEE
 WEDNESDAY, SEPTEMBER 30, 1987
 HEARINGS ON THE NOMINATION OF ROBERT BORK TO BE AN ASSOCIATE
 JUSTICE OF THE SUPREME COURT

ANTITRUST PANEL (anti-bork)

ROBERT PITOFKY - DEAN, GEORGETOWN UNIVERSITY LAW CENTER
 ROBERT ABRAMS - ATTORNEY GENERAL, NEW YORK
 CHARLES BROWN - ATTORNEY GENERAL, WEST VIRGINIA

BEVERLY LAHAYE -- CONCERNED WOMEN FOR AMERICA (pro-bork)

VILMA MARTINEZ -- PARTNER, MUNGER TOLLES & OLSEN, LOS ANGELES (anti-bork)

PANEL (pro-bork)

RABBI WILLIAM HANDLER -- UNION OF ORTHODOX RABBIS OF THE UNITED
 STATES AND CANADA

KENNETH BIALKIN -- PARTNER, WILKIE FARR & GALLAGHER, NEW YORK - did not
 appear

PANEL (anti-bork)

JOHN CLAY -- MAYER, BROWN & PLATT, CHICAGO; LAWYERS FOR THE
 JUDICIARY

JOHN C. ROBERTS -- DEAN, DEPAUL UNIVERSITY COLLEGE OF LAW
 LAWYERS FOR THE JUDICIARY

ROY INNIS -- CONGRESS OF RACIAL EQUALITY (pro-bork)

SMALL BUSINESS PANEL (anti-bork)

JIM DASKAL -- COUNSEL, SERVICE STATION DEALERS OF AMERICA;
 THE POCKETBOOK COALITION

BURT FOER -- PRESIDENT, MELART JEWELERS

FORMER ATTORNEYS GENERAL PANEL (pro-bork)

HERBERT BROWNELL

WILLIAM SAXBE - did not appear

LAW ENFORCEMENT PANEL (anti-bork)

HAROLD JOHNSON -- NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT
 EXECUTIVES

ROBERT KLIESMET -- INTERNATIONAL UNION OF POLICE ASSOCIATIONS

RONALD HAMPTON -- NATIONAL BLACK POLICE ASSOCIATION

APPENDIX TWO

Written Testimony of William T. Coleman, Jr.
on the Nomination of Judge Robert H. Bork
to be an Associate Justice of the
Supreme Court of the United States

Submitted to the Senate
Judiciary Committee

September 21, 1987

main
copy
to file

(This statement is attached to the report because it
was ~~not included~~ inadvertently left out of the
Committee Print Draft.)

<u>Introduction</u>	p. 1
<u>Summary</u>	p. 4
<u>Part I</u> - The Protection of Fundamental Rights	p. 11
<u>Part II</u> - The Anti-Discrimination Principle	p. 22
<u>Part III</u> - Effect of ABA Judicial Committee Rating in 1982	p. 41
<u>Conclusion</u>	p. 46
Appendix A - Justice Frankfurter's Approach to the Due Process Clause of the Fourteenth Amendment	
Appendix B - Justice Harlan and the Due Process Clause of the Fourteenth Amendment	
Appendix C - The Role of <u>Stare Decisis</u> in Supreme Court Constitutional Adjudication and Judge Bork's Views with Respect to Precedents	

Written Testimony of William T. Coleman, Jr.
on the Nomination of Judge Robert H. Bork to be
an Associate Justice of the
Supreme Court of the United States
Submitted to the Senate Judiciary Committee

My name is William T. Coleman, Jr., member of the bars of the Supreme Court of the Commonwealth of Pennsylvania, of the District of Columbia, and of the Supreme Court of the United States. I began my legal career as law clerk to Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit and thereafter to Supreme Court Associate Justice Felix Frankfurter, whose views on judicial restraint I greatly respect. During almost forty years as a private practitioner, I have been privileged to practice actively before the Supreme Court of the United States and other federal and state courts, and to participate in a broad range of corporate, transactional, public and international matters.

In 1975, President Gerald R. Ford nominated me to be Secretary of Transportation and, with the consent of the Senate, I was provided a rare opportunity to serve the American people as a member of President Ford's Cabinet.*

* Since 1955, I have been a member of the Board of Directors of the NAACP Legal Defense and Educational Fund, Inc. I served as its non-employee President until joining President Ford's Cabinet and since 1977 as its non-employee Chairman of the Board of Directors.

In 1981, I was a member of the ABA Judiciary Committee which rated then-practitioner Robert H. Bork "Exceptionally Well Qualified" for appointment to the United States Court of Appeals for the District of Columbia Circuit. As the member from the D.C. Circuit, it was my task to make the initial investigation.

I tried very hard to stay out of this controversy. As Chairman of the NAACP Legal Defense and Educational Fund, Inc., I was informed that members of its staff had raised serious questions about Judge Bork's suitability for appointment as a Supreme Court Justice. I told the Director-Counsel of the Fund and the staff that they had a duty to study Judge Bork's record thoroughly and fairly and to weigh the effects of the Fund's opposition if, nevertheless, he was confirmed. I assured the Director-Counsel and staff that I would not overrule them if, after a diligent and balanced inquiry, they concluded that opposing Judge Bork's nomination was essential to preserve and continue the progress in the effort to end racial discrimination and all remaining vestiges and effects thereof for which the Fund has labored so long. For, in fairness to future generations, white, black and others, male and female, the Fund's staff must consider the implications of any nominee to the Supreme Court for the extremely important and challenging work that remains to be accomplished over the next 20 to 30 years.

As the public debate continued, however, it became apparent that I cannot sidestep the controversy. On many occasions, I have come to this Congress, and to members of this Committee, asking you to take unpopular positions publicly -- for example, the 1982 amendments to the Voting Rights Act of 1965. My service as a public servant, career as a legal practitioner, and my participation in corporate and public policy decision-making simply would not have been possible if the Supreme Court had not changed so many of the discriminatory practices and attitudes that existed three decades ago. Many of these changes were the direct result of the persistence of our liberty-loving people, who invoked the aid of the courts, with ultimate review in the Supreme Court, in their pursuit of the Constitution's unfulfilled written and otherwise historically expressed promise of substantive personal liberty, equality and freedom from racial and gender discrimination. As the ultimate guardian of the constitutional legal principles that fairly resolve most controversial fundamental disputes, the Supreme Court, for the most part, has kept the protest against racial injustice and other forms of irrationality from exploding into violent confrontation in the streets. Instead, we have sought and found solutions in the courts, the board rooms, and legislative halls. As one who has benefited so greatly from this country's difficult, but steady, march towards a free, fair, and open society, the handwriting on the wall -- "mene mene

level upstart" -- would condemn my failure to appear here and testify against the confirmation of Judge Bork.

I urge this Committee not to send forward the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. If his nomination does go to the floor of the Senate for its consent, I urge the Senate to refuse to consent to this nomination.

The reasons, briefly summarized, are as follows:

SUMMARY

I. Judge Bork's Rejection of Leading Cases on Fundamental Rights of Liberty and Privacy

Judge Bork, in his writings and speeches, has repeatedly rejected the well-established line of Supreme Court decisions holding that the "liberty" in the Fifth and Fourteenth Amendments and the preamble to the Constitution protects against governmental invasion of a person's substantive personal liberty and privacy. He flatly rejects

* In the Old Testament the language of the Aramaic phrase written on the wall in Belshazzar's dream and deciphered by Daniel as meaning: "Thou art weighed in the balances, and art found wanting." Book of Daniel, ch. 5, verses 25-27 (King James version).

as "~~strongly decided~~" * the first decision in that line of cases, Meyer v. Nebraska, 262 U.S. 390 (1923),** that liberty in the Constitution means more than "merely freedom from bodily restraint." Meyer, 262 U.S. at 399. The decision in Meyer has been applied and followed in an untold number of cases from a decision handed down in 1925 -- Pierce v. Society of Sisters, 268 U.S. 510 (1925) -- to a decision handed down this past Term, Turner v. Safley, 55 U.S.L.W. 4719 (1987) -- in which the Court, in an opinion written by Justice O'Connor, held that the "liberty" in the Constitution encompasses the fundamental right of a person, including a prisoner, to marry. Judge Bork, by rejecting this line of cases, would exclude from constitutional protection "the right of the individual . . . to acquire useful knowledge, to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common

* Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 11 (1971)[hereinafter "Neutral Principles 1971"].

** In fact, the line of cases may be traced back to a Supreme Court decision in 1891: "In a line of decisions . . . going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 147, 152 (1973). See also, id. at 214-15 (Douglas, J., concurring); id. at 167-71 (Stewart, J., concurring).

law as essential to the orderly pursuit of happiness by free men." Meyer, 252 U.S. at 399.*

Included in the substantive liberty interests that Judge Bork would remove from constitutional protection is an individual's right to privacy -- the right to be let alone. See Griswold v. Connecticut, 381 U.S. 479 (1965). No constitutional concept is more deeply embedded in our nation of diverse peoples and beliefs than the respect for, and need for constitutional protection against government intrusion into, individual privacy, and a distrust of, and need for constitutional protection against, a powerful government's capacity to infringe upon individual basic substantive liberties. And no concept is likely to be more important to the preservation of a free society over the next fifty years as advances in computer technology, science, communications, and medicine substantially increase the government's capacity to invade individual privacy. Justice Stewart, who dissented in Griswold, wrote in his concurring opinion in Roe v. Wade:

Griswold stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such The Constitution

* As demonstrated in Appendices A and B, Justices Frankfurter and Harlan embraced an interpretation of the liberty component of the Due Process Clause that Judge Bork would have to reject.

nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.

Roe, 410 U.S. at 168-9.

Judge Bork's narrow view would also exclude the liberty of mobility, rejecting Justice Stewart's view in Shapiro v. Thompson that "liberty" embraces the fundamental right to travel:

'The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized. United States v. Guest, 383 U.S. 745, 757 [(1966)]. This constitutional right, which, of course, includes the right of 'entering and abiding in any State of the Union,' Truax v. Raich, 239 U.S. 33, 39 [(1915)], is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. '[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.' United States v. Guest, supra at 760, n.17. As we made clear in Guest, it is right broadly assertable against private interference as well as governmental action. Like the right of association, NAACP v. Alabama, 357 U.S. 449 [(1958)], it is a virtually unconditional personal right, guaranteed by the Constitution to us all.

394 U.S. 618, 642-43 (1969) (Stewart, J., concurring) (footnotes omitted). Judge Bork's philosophy of almost total deference to the majoritarian will of local legislative bodies, which reflect the prevailing community mores and biases, and his rejection of the constitutional right to travel would make it impossible for minorities and the poor

to seek out communities which maximize their opportunity for individual fulfillment.

Let there be no doubt. Judge Bork, both before and after he became a federal judge, has in published articles and speeches criticized these decisions as having no constitutional basis, as being wrong, and indeed, in some cases, as being "unconstitutional." And, since becoming a judge, he has not written any opinion disavowing any of his publicly stated views.

To approve someone at this stage of our legal history who rejects the Supreme Court's decisions recognizing the constitutional right of privacy and liberty, whatever the scholar's background or standing at the bar, would be akin to approving for appointment a scholar who believed that the Fourteenth Amendment was improperly adopted and thus is not part of today's Constitution.*

* There exists a body of literature advancing such a view as to the invalidity of the Fourteenth Amendment. See e.g., Suthon, The Dubious Origins of the Fourteenth Amendment, 28 Tul. L. Rev. 22 (1953); Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1063 n.88 (1984) (sources cited therein); Murphy, Book Review, Constitutional Interpretation: The Art of the Historian, Magician, or Statesman? 87 Yale L.J. 1752, 1767 n.76 (1978) (sources cited therein) (reviewing R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977)).

II. Judge Bork's Criticisms of Landmark Civil Rights Cases Under the Equal Protection Clause

Judge Bork, in his writings and speeches, has concluded that several leading constitutional decisions protecting the rights of blacks were wrongly decided and had no basis in the Constitution. These include Shelley v. Kraemer, 334 U.S. 1 (1948), decided by a unanimous Court (with three Justices not participating) in 1948, in which the majority opinion was written by Chief Justice Vinson. The Court in Shelley held that the Fourteenth Amendment forbids a state court from enforcing a racially restrictive covenant which prohibits the sale of real estate to a black person. Other decisions criticized by Judge Bork include the state poll tax cases and the decision in Regents of University of California v. Bakke, 438 U.S. 265 (1978) (affirmative action case). In objecting to these leading civil rights decisions, Judge Bork, as a scholar, has often written that the Court has exceeded its constitutional powers and is attempting to legislate. But when Congress enacts civil rights legislation, he has sometimes concluded that Congress has in turn exceeded its constitutional powers. The committee should compare his comments on Shelley with his comments on Katzenbach v. Morgan, 384 U.S. 641 (1966). See infra at 29-30, 35-38.

III. Judge Bork's Skepticism About the Effective Use of the Equal Protection Clause to Protect Women, Aliens, the Poor or Illegitimate Children

Judge Bork also rejects or would greatly limit the precedential effect of several Supreme Court decisions that place effective constitutional restrictions on the use of the strict or heightened scrutiny test to review governmental actions that discriminate on the basis of sex, illegitimacy, poverty, or alienage.

IV. Judge Bork's Inconsistency With the Frankfurter-Harlan Tradition of Judicial Restraint

Contrary to the assertion of some of Judge Bork's prominent supporters, his judicial philosophy is contrary to, and inconsistent with, that of Justice Harlan and particularly Justice Frankfurter, who greatly shaped my own views of judicial restraint and of the proper role of the Supreme Court in a constitutional democracy.

V. Continuing the Court's Role in Achieving a Fair Society For All

Finally, even though I generally agree with President Reagan's views on a strong defense, the need to reduce the public deficit, and the importance of returning power to the states and the private sector, I disagree with

his view that the Supreme Court has been creating constitutional law rather than interpreting it. I also firmly believe that, having come this far towards a free and open society, it is not in the public interest to stop or turn back the constitutional development that slowly and steadily is removing the vestiges of slavery, of 350 years of legally enforced racial discrimination, and of centuries of irrational discrimination against women.

Let us turn to each of these reasons:

DISCUSSION

I. The Protection of Fundamental Rights

Since at least 1923* the Supreme Court has recognized that the "liberty" protected by the Due Process clauses of the Fifth and Fourteenth Amendments is not limited to "freedom from bodily restraint" but has substantive content and thus embraces certain basic individual liberties. Meyer, 262 U.S. at 399. See also Pierce, 268 U.S. at 510 (1925). As the Court in Meyer recognized, those liberties include "the right of the individual . . . to acquire useful knowledge, to marry,

* As stated earlier, supra p. 5, the proper date may in fact be at least 1891.

establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer, 252 U.S. at 399. These substantive liberty rights were assumed by me to be part of every American's heritage even before I attended law school. Everything I have learned since as a lawyer in trying to understand the yearnings of Americans, including what I have learned from reading Supreme Court decisions, has only reinforced that belief. It has become an established part of our legal tradition to view the Constitution as forbidding government abuses which, in the words of Justice Frankfurter, "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples." Adamson v. California, 332 U.S. 46, 59, 66-67 (1947) (Frankfurter, J., concurring). See also Poe v. Ullman, 367 U.S. 497, 522, 543 (1961) (Harlan, J., dissenting).

The conclusion that the liberty in the Fifth and Fourteenth Amendments and the preamble to the Constitution has substantive content in the realm of personal rights has been accepted by every Justice with the possible exception of Justice Hugo Black,* whose somewhat distinctive jurisprudence

* As Senator Specter pointed out at these hearings on Friday, September 18, 1987, Justice Black accepted this conclusion when he voted with the Court in Bolling v. Sharpe, 347 U.S. 497 (1954), the District of Columbia school desegregation case.

resulted from his premise that the first eight amendments in their entirety are incorporated in, and represent both the floor and the ceiling of, the Fourteenth Amendment. Justice Harlan's concurring opinion in Griswold v. Connecticut, 381 U.S. at 499-501 (1965), clearly demonstrates the error in Justice Black's view.* See also Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1959). Encompassed within the long-established view of the meaning of liberty in the Constitution is the fundamental right to privacy, which has been held by the Court in a long line of cases to encompass personal decisions relating to marriage, Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley; procreation, Skinner v. Oklahoma; 316 U.S. 535 (1942); contraception, Griswold v. Connecticut; Eisenstadt v. Baird; 405 U.S. 438 (1972); family relationships, Prince v. Massachusetts; 321 U.S. 158 (1944); abortion, Roe v. Wade; and child rearing and education, Pierce; Meyer.

* Of course, even Justice Black's view gives substantive content to the word "liberty" in the Fourteenth Amendment, as that is necessarily implied by the incorporation of the first eight amendments into the Fourteenth Amendment through the word "liberty." Justice Douglas agreed to a point, although in his view the first eight amendments did not exhaust the substantive content of the word "liberty" in the Constitution.

Justice Powell, for instance, wrote in Moore v. East Cleveland, 431 U.S. 494 (1977), in a decision striking down a housing ordinance restricting dwellings to traditional single family living arrangements,

[a] host of cases tracing their lineage to [Meyer and Pierce] have consistently acknowledged a 'private realm of family life which the state cannot enter'" (citation omitted).

Moore, 431 U.S. at 499. And just this past Term Justice O'Connor, in a portion of the opinion joined by every member of the Court in Turner v. Safley, 55 U.S.L.W. 4719 (1987), held that the Constitution's protection of "liberty" prevented a state from prohibiting a man in jail from marrying, stating that there exists "a constitutionally protected marriage relationship in the prison context." Id. at 4724.

Justice Stewart also agreed that "liberty" in the Constitution has substantive content. Although he dissented in Griswold, in his concurring opinion in Roe v. Wade he indicated his acceptance of the long line of substantive due process decisions:

Griswold stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty'

protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.

Griswold, 366 U.S. at 268 (1965).

Judge Bork rejects this fundamental concept of due process and substantive personal liberty, as well as the decisions which have recognized and followed it. Both before and after he became a judge, he has harshly criticized the entire line of decisions recognizing a fundamental right to privacy.

With regard to Griswold, where the Court struck down a Connecticut ban on the use of contraceptives as a violation of the fundamental right to privacy protected by the Due Process Clause, Judge Bork wrote the following:

Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right to privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in Griswold through principle.*

* "Neutral Principles 1971," supra p. 5, at 8-9.

He continued:

All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of 'fairness' or to what it regards as 'fundamental' interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as Griswold v. Connecticut.*

Subsequent to becoming a federal judge, Judge Bork continued his criticism of Griswold. He wrote that the result in that case could not "have been reached by interpretation of the Constitution,"** and that Griswold, along with "all the sexual freedom cases," represented the Court's "imposition of upper middle class, college education, east-west coast morality."*** In his view, "[s]ince there is no constitutional test or history to define the right, privacy becomes an unstructured source of judicial power."**** He has repeatedly referred to Griswold and its progeny as "the so-called right to privacy cases, which deal with sexual

* "Neutral Principles 1971," supra p. 5, at 11-12.

** Address by Judge Robert H. Bork, Catholic University, at 4 (Mar. 31, 1982) [hereinafter "Catholic University 1982"].

*** Address by Judge Robert H. Bork, Federalist Society, Yale University, pt. 2, at 8-9 (Apr. 24, 1982) [hereinafter "Federalist Society 1982"].

**** Address by Judge Robert H. Bork, University of San Diego Law School, at 10 (Dec. 1983).

morality,"* and in an interview in 1986 restated his views first expressed 15 years earlier:

I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision. The majority opinion merely notes that there are a lot of . . . guarantees of aspects of privacy. . . . Of course, that right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies.**

Judge Bork has also criticized the decision in Roe v. Wade. In 1981 he testified that Roe v. Wade "is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority"*** and stated in a speech that it has "no constitutional foundation."**** After becoming a judge in 1982 Judge Bork, in his non-judicial writings and speeches, continued his attacks on Roe and described the result of that case as the outgrowth of the "gentrification of the Constitution" and the Court's

* Address by Judge Robert H. Bork, Brookings Institute, at 6 (Sept. 12, 1985).

** An Interview with Judge Robert H. Bork, 3 Judicial Notice 9 (June 1986).

*** Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 97th Cong., 1st Sess. 310, 315 (1982) [hereinafter "Human Life Hearings 1982"].

**** Address by Judge Robert H. Bork, Seventh Circuit, at 7 (c. 1981) [hereinafter "Seventh Circuit 1981"].

attempt at the "nationalization of morality through the creation of new constitutional rights."* In an interview in 1984 Judge Bork repeated his view that there was nothing in the Constitution about the right to have an abortion.**

Both Meyer v. Nebraska and Pierce v. Society of Sisters, which Justice Powell in Moore cited approvingly as the genesis of the substantive due process decisions, supra p. 14, have also been the subject of Judge Bork's criticism. In Meyer the Court struck down a law prohibiting the teaching of foreign languages to young children, holding that liberty "denotes not merely freedom from bodily restraint" but also the right

to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399. In Pierce the Court held unconstitutional a state law requiring children to attend public schools on

* "Federalist Society 1982," supra p. 16, at 8; see also Notes for Speech, NYU Law Review Banquet, at 3 (May 1, 1982). Research has revealed no judicial opinion in which Judge Bork has rejected, revised or modified these views.

** Robert Bork: In His Own Words, Washington Post, July 5, 1987.

the ground that it interfered with the liberty interests of parents and guardians to direct the upbringing and education of the children under their control. Judge Bork has stated that Meyer was "wrongly decided" since the Constitution fails to specify "which liberties or gratifications may be infringed by majorities and which may not."* He has also argued that Pierce was "wrongly decided," although conceded that "perhaps Pierce's results could be reached on acceptable grounds."** This qualified concession probably refers only to that part of the holding in Pierce relating to religious schools which implicated First Amendment interests, and not the part relating to non-religious private schools.

Judge Bork has also objected to the decision in Shapiro v. Thompson, 394 U.S. 618 (1969), recognizing a right to travel. Justice Stewart observed in a concurring opinion in Shapiro:

'The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized. United States v. Guest, 383 U.S. 745, 757 [(1966)]. This constitutional right, which, of course, includes the right of 'entering and abiding in any State

* "Neutral Principles 1971," supra p. 5, at 11.

** Id.

of the Union,' Truax v. Raich, 239 U.S. 33, 39 [(1915)], is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. '[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.' United States v. Guest, supra at 760, n.17. As we made clear in Guest, it is a right broadly assertable against private interference as well as governmental action. Like the right of association, NAACP v. Alabama, 357 U.S. 449 [(1958)], it is a virtually unconditional personal right, guaranteed by the Constitution to us all.

Shapiro, 394 U.S. at 642-43 (1969) (Stewart, J., concurring) (footnotes omitted). Judge Bork has included Shapiro in his list of decisions he considers "improper and intellectually empty."* Judge Bork's philosophy of almost total deference to the majoritarian will of local legislative bodies, which reflect the prevailing community mores and biases, even where substantive personal liberty and/or privacy are involved, makes the constitutional right to travel an imperative for minorities and the poor who seek out communities which provide them a meaningful opportunity for individual fulfillment.

Some have supported Judge Bork on the ground that his expressions of "judicial restraint" put him in the tradition of Justice Frankfurter and Harlan. In light of his

* "Neutral Principles 1971," supra p. 5, at 11-12.

views on substantive liberty and privacy, it is clear that this characterization is 100% wrong. Attached as Appendices A and B are discussions of opinions written by Justices Frankfurter and Harlan stating their views regarding the constitutional rights of liberty and privacy, views which are wholly at odds with the positions that Judge Bork has advanced.

There can be no question that privacy and substantive individual liberty interests are clearly within the Constitution as written. Moreover, for more than half a century, the Supreme Court, by recognizing the constitutional basis for the protection of such fundamental liberties, has been able to respond in a principled fashion to the unforeseen problems and abuses which the framers could not have foreseen and thus cannot plausibly be said to have intended to immunize from constitutional protection. In another major branch of constitutional law, namely the Commerce Clause, Judge Bork has recognized the necessity of a pragmatic and sensitive constitutional interpretation in order to meet the changing "needs of the nation."* Yet where private individuals and families are involved, Judge Bork exhibits none of this pragmatism; he simply refuses to use the specific

* Transcript, September 15, 1987, at 180.

text "liberty" and over sixty years of Supreme Court jurisprudence or, if necessary (which it is not), the open textured language of the Due Process Clause, to afford them constitutional protection from any intrusion in addition to mere physical restraint.

To approve someone at this stage of our legal history who rejects the Supreme Court's decisions recognizing the constitutional right of privacy and liberty, whatever the scholar's background or standing at the bar, would be like approving for appointment a scholar who believed that the Fourteenth Amendment was improperly adopted and thus is not part of today's Constitution.*

II. The Anti-Discrimination Principle

That the Equal Protection Clause prohibits certain forms of invidious discrimination is manifest from the text and history of the Fourteenth Amendment. For decades the Supreme Court, in a sensitive and perceptive manner, has recognized that the bigotry long directed at blacks has been directed at other groups as well, including women, aliens,

* As previously indicated, supra at 8, there exists a body of literature advancing the view that the Fourteenth Amendment is invalid.

and illegitimate children. This salutary application of the grand principle of anti-discrimination to the complex realities of American life is dismissed by Judge Bork as merely the result of "fads in sentimentality."*

Judge Bork's views, as a scholar and lecturer, on discrimination against women are especially disturbing. In his 1971 article he stated that "cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or equal protection clause."** He has reiterated this view in more recent statements. In a speech he gave in 1982 he stated that "[w]e know that, historically, the Fourteenth Amendment was meant to protect former slaves."*** In August 1985 at Aspen, Colorado he said during a question and answer session following his speech:

In the Fourteenth Amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity (pause) is pretty much what the 14th Amendment is about; because if it's about more than that, it's about a

* "Catholic University 1982," supra p. 16, at 19.

** "Neutral Principles 1971," supra p. 5, at 17.

*** "Catholic University 1982," supra p. 16, at 18.

judge making up what more it's about. And I don't think he should.*

In 1987 he renewed his conclusion that "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity."** If Judge Bork holds to these views he would reject cases such as Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980), which holds that the Equal Protection Clause forbids discrimination on the basis of sex, absent some significant governmental need to make such distinction. The strict or heightened scrutiny test is needed; mere reasonableness or rationality is not sufficient in gender discrimination cases.

Judge Bork has been similarly critical of Supreme Court decisions holding that discrimination against other groups should be carefully scrutinized. In a line of decisions beginning with Levy v. Louisiana, 391 U.S. 68 (1968), for instance, the Court has reviewed and struck down a variety of laws which discriminated against illegitimate children. The Court has justified heightened scrutiny

* Transcription from tape-recording of comments by Judge Bork at the Justice and Society Seminar, Aspen Institute for Humanistic Studies, Aspen, Colorado, August 1985.

** Bork, Bicentennial of the U.S. Constitution, Worldnet Interview, June 10, 1987, p. 12 [hereinafter "Worldnet 1987"].

because, as Justice Powell wrote, illegitimate children have "been a frequent target of discrimination." Trimble v. Gordon, 430 U.S. 762, 775 n.16 (1977). The Court has also applied heightened scrutiny to laws that discriminate against aliens. Graham v. Richardson, 403 U.S. 365 (1971); Ambach v. Norwick, 441 U.S. 68 (1979). Judge Bork has included Levy in his catalogue of decisions which he views as "improper and intellectually empty" and as explainable only as the result of "the Court's preference for particular values."* And in a speech in 1982 Judge Bork made the more general criticism that groups other than racial and ethnic minorities cannot complain if their cause does not prevail in the "democratic process."** Judge Bork has been equally critical of the decision in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), which struck down a Virginia poll tax as impermissibly discriminating "on the basis of wealth." Id. at 668. He has stated that the case was "wrongly decided" and could not be defended on equal protection grounds.***

* "Neutral Principles," supra p. 5, at 11-12.

** "Catholic University," supra p. 16, at 17-19.

*** Nomination of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 5 (1973) (testimony of Robert H. Bork) [hereinafter "Confirmation Hearings 1973"].

Few, if any, of the members of this Committee, or of the rest of the Senate, or of the individuals in this room, would maintain that the aliens, the illegitimate children, or, indeed, the poor if not able to register to vote because of the poll tax, could achieve the legislative majorities necessary to end the discrimination and the unfairness against such "discrete and insular groups" that Judge Bork would deny the courts power to invalidate as violations of equal protection or due process of law.

Having stated that the application of the Equal Protection Clause should be limited to matters of race and ethnicity,* Judge Bork then goes on to reject many of the landmark victories won by black Americans before the Court: the restrictive covenant cases,** the first affirmative action case,*** the poll tax case,**** and the literacy voting cases.***** At almost every critical turning point

* See, supra at 23-25.

** Shelley v. Kraemer, 334 U.S. 1 (1948); see also Barrows v. Jackson, 346 U.S. 249 (1953).

*** Regents of University of California v. Bakke, 438 U.S. 265 (1978).

**** Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

***** Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).

in the civil rights movement as exemplified in these cases, Judge Bork has, as a public speaker and scholar, turned the wrong way.

Judge Bork's treatment of restrictive covenants is particularly significant. Racial segregation in residential housing, apartments and hotels was the way of life in this country at least through 1945. The Supreme Court in 1917 in Buchanan v. Warley, 245 U.S. 60 (1917), had held that a city could not create racial ghettos by city ordinance. The same result was accomplished, however, by private, racial restrictive covenants and by the refusal of private hotel and apartment houses to rent to blacks. Thus, in most cities, North and South, the dominant residential pattern was racial segregation. This obviously had an effect on the makeup of the public schools, and on the ability of people to get to know each other and work together, even where racial segregation by law had been abolished by state statutory or constitutional provisions.

In 1948, in Shelley v. Kraemer, the Supreme Court, by a six to zero* majority, held, in an opinion by Chief Justice Vinson and which Justices Black and Frankfurter,

* Justices Reed, Jackson and Rutledge did not participate in the case.

inter alia, joined, that the Fourteenth Amendment prevented a state court from enjoining the sale of real estate by a white to a black person because the deed contained a racially restrictive covenant. The case was based in part on Section 1 of the Civil Rights Act of 1866, which provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (R.S. § 1978). The Court, following earlier decisions, also held that a judicial injunction based on the racially discriminatory language of a private contract violated the Fourteenth Amendment. The Court said:

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitution commands.

Shelley, 334 U.S. at 19-20 (footnotes omitted).

Five years later in Barrows v. Jackson, 346 U.S. 249 (1953), the Court, relying on Shelley, held by a 6 to 1 majority* (with Justices Reed and Jackson again not participating) that it would violate the Fourteenth Amendment for a state court to award damages against a white seller who sold property to a black buyer in breach of a restrictive covenant. The Court stated:

If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in Shelley. . . .

Barrows, 346 U.S. at 254.

In 1971, 23 years after Shelley, 18 years after Barrows, and 3 years after Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding Thirteenth Amendment bars racial

* Chief Justice Vinson dissented. He fully accepted Shelley, but argued that since the lawsuit in Barrows was between two whites who had signed the restrictive covenant, the house had already been conveyed to the black buyer, and no claims were being brought against the black buyer, there was no one before the Court whose constitutional rights would be violated by an award of damages by the state court against the white seller.

discrimination even in the absence of any state action), and despite numerous cases supporting the principle in Shelley, Judge Bork took the position that the restrictive covenant cases were wrongly decided. Lest there be any doubt, this is what Judge Bork has written:

Shelley v. Kraemer . . . was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish . . . [Shelley] converts an amendment whose text and history clearly show it to be aimed at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion.*

In short, Judge Bork believes that judicial enforcement of private agreements, even where it involves an injunction against the voluntary actions of two people to enter into a contract to sell a house to a black person, does not involve discriminatory state action.

Judge Bork's conclusion fails to come to grips with the fact that, prior to Shelley and in the decades since then, the Supreme Court has recognized in a wide variety of contexts that "the action of state courts and judicial officers in their official capacities" is state action subject to the commands of the Constitution. Shelley, 334 U.S. at 14. Chief

* "Neutral Principles 1971," supra p. 5, at 15-16 (emphasis added).

Justice Vinson's list of those cases which in his view supported the holding in Shelley included the following:

- Ex parte Virginia, 100 U.S. 313 (1880), holding unconstitutional the actions of a judge restricting jury service to whites;
- American Federation of Labor v. Swing, 312 U.S. 321 (1941), holding enforcement by state courts of common law to restrain peaceful picketing constituted state action prohibited by the Constitution;
- Cantwell v. Connecticut, 310 U.S. 296 (1940), holding state conviction for common law crime of breach of peace to violate due process guarantee of freedom of religion;
- Bridges v. California, 314 U.S. 252 (1941), holding enforcement of common law rule relating to contempts by publications constituted unconstitutional state action.

Chief Justice Vinson also included cases overturning convictions obtained by coerced confessions, through the use of perjured testimony, or without the effective assistance of counsel. See Shelley, 334 U.S. at 16-17. And as Justice Douglas stated in his concurring opinion in Lombard v. Louisiana, 373 U.S. 267 (1963), "[m]ost state convictions in violation of the First, Fourth, or Fifth Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, have indeed implicated not the state legislature but the state judiciary, or the state judiciary and the state prosecutor and the state police." Id. at 279.

The line of cases beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), decided seven years before

Judge Bork's 1971 article, provides further support for the continuing vitality of the Shelley principle. In those cases the Court has consistently subjected common law defamation and privacy rules in controversies strictly between two private parties to First Amendment scrutiny, thereby necessarily finding the requisite state action present. In Sullivan the Supreme Court of Alabama had rejected the constitutional claims of The New York Times Company with the "brief statements that 'The First Amendment of the U.S. Constitution does not protect libelous publications' and 'The Fourteenth Amendment is directed against State action and not private action.'" Id. at 264 (citations omitted). The Supreme Court of the United States reversed, stating:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citation omitted). See also Near v. Minnesota, 283 U.S. 697 (1931) (holding state statute authorizing prior restraint on press in violation of Fourteenth Amendment); Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957) (holding Fourteenth Amendment violated when Pennsylvania courts applied

a "white only" clause in a will to exclude black orphans from Girard College).

Only three years ago in Palmore v. Sidoti, 466 U.S. 429 (1984), Chief Justice Burger, writing for a unanimous Court, cited Shelley and Ex parte Virginia for the proposition that "[t]he actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. [Shelley, 334 U.S. at 14; Ex parte Virginia, 100 U.S. at 346-47.]" Palmore, 466 U.S. at 432 n.1. Judge Bork's views would call into question many of these decisions.

Judge Bork's views are especially puzzling and disturbing given that, three years before his 1971 law review article criticizing Shelley, the Court had held (by a 7-2 majority) that the 1866 Civil Rights Act, which was relied on in Shelley, did not require any state action at all. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).*

* Runyon v. McCrary, 427 U.S. 160 (1976), merely applied this principle to private schools. Private black parties won the case below. The United States Government filed a brief in the Supreme Court as amicus curiae urging affirmance. Solicitor General Bork, along with Deputy Solicitor General Lawrence Wallace and Assistant Attorney General for Civil Rights signed the brief. The Official Report of the Supreme Court shows no indication that Solicitor General Bork made an oral argument.

Jones decision was strongly reaffirmed and in fact extended just last Term when the Court held 9 to 0 that private discrimination violates the 1866 Act even when the victims are discriminated against because they are Arabs or Jews, rather than because of the color of their skin. Saint Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987); Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987).

In rejecting major civil rights decisions, Judge Bork often asserts that the aggrieved and often unpopular minority should seek redress through the legislative process. But where such legislative redress has been won, Judge Bork sometimes has challenged the legitimacy of the legislative action. For example, when Congress was finally stirred to action by such catastrophic events as the death of Martin Luther King, Jr., the physical attacks on thousands of sit-in students and the death of President John F. Kennedy, and by the ascension of a southerner to the Presidency -- Lyndon Johnson -- who understood firsthand the blacks' yearning for equal justice, Judge Bork objected to the legislative action on the ground that it invaded the "liberty" of whites,* or was beyond the power of Congress.**

* Bork, Civil Rights -- A Challenge, The New Republic, at 22 (August 31, 1983) (emphasis added) [hereinafter "New Republic 1983"]:

(footnotes cont'd on next page)

Judge Bork's published constitutional beliefs, again written as a scholar, would impose severe, unfair and unwarranted restrictions on the power of Congress under section 5 of the Fourteenth Amendment, restrictions that the Court has already rejected. Section 5 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. There were two possible positions regarding the scope of section 5. The narrow view adhered to by Judge Bork in his public speeches and writings is that Congress cannot enact any statute that would make illegal any action which would not violate the Amendment itself in the absence

(footnotes cont'd from previous page)

Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss . . . the cost in freedom which must accompany it . . . There seems to be a strong disposition on the part of the proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does so is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate . . . Of the ugliness of racial discrimination there need be no argument . . . [But] [t]he principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

** See Bork's comments on Katzenbach v. Morgan, infra at 35-37.

of the statute. Under this cramped view Congress can only add penalties or remedies to what is already a constitutional violation.* The Court unanimously rejected this view in Oregon v. Mitchell, 400 U.S. 112 (1970). In this case the Court advanced the appropriate and constitutionally-based view that where Congress had determined that the literacy tests were used to disqualify blacks from voting, it could under section 5 prohibit the use of literacy requirements in state elections even though, prior to the statute's enactment, the Court had specifically held that such requirements were not per se unconstitutional. See Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959). The view set forth in Oregon and Katzenbach v. Morgan, 384 U.S. 641 (1966), has been relied on to uphold Congressional action in Rome v. United States, 446 U.S. 156 (1980) (rejecting challenge to the "discriminatory effects" test applied under the Voting Rights Act), and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding Title VII as exercise of Congress's power under the Fourteenth Amendment). See also United States v. Guest, 383

* Bork, Constitutionality of the President's Busing Proposals, American Enterprise Institute, at 10 (1972) ("The [Katzenbach v. Morgan] [, 384 U.S. 641 (1966),] decision embodies revolutionary constitutional doctrine"); "Confirmation Hearings 1973," at 16 (Katzenbach "incorrect"); "Human Life Hearings 1982" supra p. 17 at 310. ("I agree entirely with the dissent . . . in Katzenbach v. Morgan"); "Seventh Circuit 1981", supra p. 17, at 5 ("Katzenbach v. Morgan is terrible law.").

U.S. 745, 782, 784 (1966) (Brennan, J., concurring in part and dissenting in part) (§ 5 of the Fourteenth Amendment empowers Congress to punish private conspiracies to violate constitutional rights); id. at 761 (Clark J., concurring, joined by Harlan, J.).

Not only does Judge Bork believe that under section 5 Congress cannot establish rights not found in section 1 of the Fourteenth Amendment, he also believes that Congress can cut down on the remedy that courts could otherwise impose under the Fourteenth Amendment. For example, in Swann v. Charlotte Mecklenburg, 402 U.S. 1 (1971), the Court, in an opinion written by Chief Justice Burger, held 9 to 0 that once a district court had found that the School Board had discriminated on the basis of race, the court could order school busing to desegregate the school system in the same area in which the Board exercised its power to segregate. The Court said: "As with any equity case, the nature of the violation determines the scope of the remedy." Id. at 16. Judge Bork, however, maintains that Congress, by statute, could reduce the Court's power to desegregate.*

* Equal Educational Opportunities Act, 1972: Hearings on S. 3395 Before the Subcomm. on Education of the Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 1312 (1972) (statement of Prof. Robert Bork, Yale University Law School).

Nothing in Judge Bork's actions as Solicitor General dispels the honestly-held fears generated by his erroneous views of the meaning and effect of the Fourteenth Amendment. The reasons why are clear. First, he expressed many of these views after he left the Office of the Solicitor General.* Second, briefs which he filed in that capacity seldom if ever had any direct bearing on the Equal Protection Clause, since the cases generally involved statutory rather than constitutional issues.** Third, it would be inappropriate

* See supra p. 23-24.

** If it were claimed that Judge Bork's constitutional views derived from some animus towards minorities or women, the filing of briefs in statutory civil rights cases might be of some relevance. The objection set forth in this testimony, however, turns on the substantive injustices that Judge Bork's views of the Constitution would permit, so any claim of malice on his part is not reached. There is no need to reach the issue whether his personal views would lead him, when reviewing a clearly drafted Congressional enactment prohibiting sex or race discrimination, not to apply the literal words of the statute. The concern, rather, centers on his judicial review of a statute prohibiting a state practice, which the Supreme Court prior to the enactment of the statute had held did not violate the 14th or 15th Amendments, see Northhampton County Board of Elections, 360 U.S. 45 (1959), and which practice Congress subsequently prohibited by statute, after legislative findings that the practice adversely affected persons because of their race or sex.

If Judge Bork adhered to his previously expressed criticisms of Katzenbach v. Morgan, 384 U.S. 641 (1966), or Oregon v. Mitchell, 400 U.S. 112 (1970), he would either invalidate such a statute as exceeding Congress' powers under section 5 of the 14th amendment or section 2 of the 15th amendment, or he would construe such a statute so narrowly (to avoid his perceived constitutional defects) as to eviscerate their effect and undermine congressional intent.

to attempt to draw from Judge Bork's work, as Solicitor General any conclusions about his personal views on the constitutional issues discussed above. The Solicitor General in the Ford Administration, as in previous and subsequent administrations, was the government's lawyer in Supreme Court cases, charged with presenting in that Court policies and legal views which other officials were primarily responsible for formulating.*

The most reliable evidence of Judge Bork's views consist, of course, of his writings and speeches that pre-date his nomination to the Supreme Court of the United States. Although, as indicated above, research has revealed no judicial opinion authored by Judge Bork on these issues,

* Antitrust policy was made in the FTC and the Antitrust Division, and Judge Bork properly defended it without regard to his personal views; primary responsibility for formulating Administration civil rights policy was, as under other administrations, in the Civil Rights Division. Where the United States is a party to a case which goes to the Supreme Court, it is the established and proper policy of any Solicitor General to adhere, absent very unusual circumstances, to the government's position in the lower courts. At his confirmation hearings for the Office of the Solicitor's General in 1973, Judge Bork acknowledged that as Solicitor General he would be prepared to "put aside [his] personal philosophy" and represent the Government "on the basis of the policy as enunciated by the agencies and the Attorney General and on the basis of the law as it presently stands." "Confirmation Hearings 1973," *supra* p. 25, at 24. Ordinarily the framing of amicus brief is similarly constrained by a practice of advocating a position similar to that taken in the same or other cases in the lower courts by the responsible division of the Department of Justice.

many of his writings and speeches referred to herein post-date his becoming a judge. This Committee and the Senate should give great weight in forming their judgment on the views reflected in those earlier statements. Such a judgment cannot be based on any commitments, to the extent such commitments can ever be meaningful, from a nominee as to what he or she would do in a hypothetical future case. A nominee's future treatment of precedents which he has publicly criticized as wrongly decided, without constitutional basis, and indeed, in some instances, as "unconstitutional," is unpredictable at best, despite any commitments that might be made. In addition, Judge Bork has, in his public writings and statements, as recently as 1986, suggested using the appointment power as one way of overturning wrongly decided cases.* I would thus urge this Committee and the Senate, in assessing the views expressed by Judge Bork prior to and during these hearings, to bear in mind what he has said prior to these hearings about overruling constitutional precedents with which a Justice disagrees:

Since the legislature can do nothing about the interpretation of the Constitution given by a court, the Court ought to be always open to rethink Constitutional

* Bork, Judicial Review and Democracy, 3 Encyclopedia of the American Constitution 1062 (1986); see also Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1, 13 (1982) [hereinafter "Confirmation Hearings 1982"].

problems. . . . [A]t bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent.*

Supreme Court justice[s] always can say . . . their first obligation is to the Constitution, not to what their colleagues said 10 years before.**

[I]f a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court.***

Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended.****

III. Effect of ABA Judicial Committee Rating In 1981

As stated previously, I was a member of the ABA Standing Committee on Federal Judiciary in 1981 when it evaluated Judge Bork as being "Exceptionally Well Qualified" for appointment as a judge to the U.S. Court of Appeals for

* A Talk With Robert H. Bork, 9 District Lawyer 32 (May/June 1985).

** Justice Robert H. Bork: Judicial Restraint Personified, California Lawyer, (May 1985).

*** "Confirmation Hearings 1982," supra p. 40, at 13.

**** "Federalist Society 1987, at 126. The same argument is handwritten in the prepared text of the speech, p. 4. ("no problem w/ originalist judge overruling non-originalist decision").

the District of Columbia Circuit. Some have suggested that this 1981 ABA rating should be conclusive, or at least almost so, as to whether this Committee should give its consent to the President's nominee for the Supreme Court of the United States. There are at least three reasons why such an approach is in error:

1. The ABA Judiciary "Committee's evaluation of prospective nominees to . . . [the Court of Appeals] is directed primarily to professional qualifications, competence, integrity and judicial temperament."* The Committee does not "investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity."** Instead, "the Committee restricts its review primarily to issues bearing on professional qualifications." The Committee specifically points out and recognizes that "the Senate may consider other aspects of the prospective nominee's qualifications."***

* ABA Standing Committee on Federal Judiciary: What It Is And How It Works, (1983) at 3.

** Id. at 4.

*** Id. at 1.

In an inquiry so limited, a review of Judge Bork's performance in law school, as a partner in a leading law firm, as a professor at a leading law school, and as Solicitor General of the United States revealed no evidence of a lack of judicial temperament as that term is understood by the legal profession. Based on that standard, he thus was entitled to a rating of "Exceptionally Well Qualified" for the Court of Appeals for the District of Columbia Circuit. But the investigation was limited in scope and for the circuit court only.* In any event, as the Bar understands it, it is neither the purpose nor the function of the ABA Judiciary Report to urge confirmation.

2. The ABA's procedure and rating for Supreme Court nominees "differ,"** and "are dealt with separately"*** in the ABA's investigation and rating system. The standard guiding that evaluation of nominees is completely different. It is still "limited to their professional qualifications -- their professional competence, judicial temperament and integrity,"**** but there are other factors considered which

* Id. at 4.

** Id. at 1.

*** Id.

**** Id. at 7.

are not relevant to a Court of Appeals nominee. The instructions provide: "The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability. To fulfill the responsibilities of a Supreme Court Justice, it is not enough that one be a fine person or a good lawyer."* These factors were never considered when Judge Bork's qualifications for the Court of Appeals were passed upon.

3. There are other reasons why the ABA Judiciary Committee's findings relative to Judge Bork's qualifications for the D.C. Circuit are not conclusive here:

(a) Few cases in the Court of Appeals for the District of Columbia Circuit involve the constitutional civil rights and liberty issues discussed in this testimony that are so much of the staple diet of the Supreme Court. In fact, in Judge Bork's five years on the D.C. Circuit he has written only one opinion for the court in a case in that category, namely, Dronenburg v.

* Id. at 8 (emphasis added).

Zech, 741 F.2d 1388 (D.C. Cir. 1984) (rehearing en banc denied, Nov. 15, 1984) (Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection).*

(b) As a lower court judge his opinions are subject to review by the Supreme Court and as Judge Bork has recognized, a lower court judge has a great responsibility to follow the precedents of the Supreme Court.

4. In any event, the ABA Judiciary Committee clearly recognizes that the Senate Judiciary Committee should, and does, have a wider range of inquiry and this responsibility may on occasion lead to its failure to consent to the President's nomination; in the same way a President, for other public policy reasons, may decide not to make a nomination for a Justice, even though the person is one whom the ABA Judicial Committee would find "well qualified." As Senator Thurmond stated to his colleagues in the Senate in connection with the nomination of Justice Abe Fortas to be Chief Justice of the Supreme Court, "[t]o contend that we must merely satisfy

* This testimony does not discuss Judge Bork's views on free speech or free press except to the extent that state action must be involved before there is constitutional protection.

ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the constitution itself nor history and precedent has prescribed."*

CONCLUSION

Should this Committee ignore Judge Bork's long-held public views because there is a possibility that his opinions on the Supreme Court would not be based on those views? So far in his role as a judge, Judge Bork has found few, if any, occasions in a judicial decision, to reject positions which he expressed prior to becoming a judge; his speeches since his becoming a judge, on the other hand, expressly adhere to his earlier views.** Judge Bork's supporters will argue that it is possible that oral argument, briefs, or his respect for precedent might cause him to change his mind with

* 114 Congressional Record 28771 (1968).

** See, e.g., "Catholic University 1982" supra p. 16, at 3 (criticizing Griswold); "Federalist Society 1982," supra p. 16, pt. 2 at 8-9 (criticizing Griswold); id. at 10 (objecting to protecting women under the Equal Protection Clause); "Worldnet 1987," supra p. 24, at 12-13 (objecting to protecting women under the Equal Protection Clause); "Seventh Circuit 1981," supra p. 17, at 4 (criticizing Katzenbach v. Morgan); Address by Judge Robert H. Bork, First Annual Lawyer's Convention of the Federalist Society, at 126 (Jan. 31, 1987) [hereinafter "Federalist Society 1987"]. The same argument is handwritten in the prepared text of the speech, p.4 ("no problem w/ originalist judge overruling non-originalist decisions.").

respect to views he has held throughout his academic and judicial life so far. But we have been reminded constantly that when constitutional issues are involved, Justices do not feel the same restraint not to overrule prior decisions of the Supreme Court that they do when only a question of statutory interpretation is involved.

For example, then Justice Rehnquist, in Wengler v. Druggists Mutual Insurance Co. 446 U.S. 142, 153-4 (1980), said in his dissenting opinion that he continued "to believe that California v. Goldfarb, 430 U.S. 199 [(1977)], was wrongly decided, and that constitutional issues should be more readily reexamined under the doctrine of stare decisis than other issues." Attached as Appendix C is a discussion of other cases in which individual Justices have expressed similar views regarding stare decisis, as well as Judge Bork's public statements regarding constitutional precedents of the Supreme Court. One of these cases I know all too well, because I was the unfortunate lawyer who argued it. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), Justice Blackmun rejected his own previous concurring opinion, and instead wrote the opinion that overruled National League of Cities v. Usery, 426 U.S. 833 (1976).

Judge Bork, in his writings, has made clear his views on the limited constraint of precedent and stare decisis in approaching issues of constitutional dimension:

Certainly, at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his philosophy, has no legitimacy.*

Supreme Court justice[s] always can say. . . [their] first obligation is to the Constitution, not to what their colleagues said ten years before.**

Judge Bork has criticized many of the Supreme Court decisions discussed above as wrongly decided, as being without a constitutional basis, and in some instances as themselves "unconstitutional." In light of these criticisms and Judge Bork's views regarding the role of a Justice regarding constitutional precedents, it is difficult to believe that as a Justice he would feel bound to follow those prior decisions.

So, in the final analysis, it comes down to a simple proposition. If it turns out that Judge Bork as a

* "Federalist Society 1987" supra, p. 46, at 126 (emphasis added).

** Justice Robert H. Bork: Judicial Restraint Personified, California Lawyer (May, 1985).

Justice would reject his writings and accept the valued Supreme Court precedents described above, then to have rejected him because of his writings could perhaps be argued as unfair to him. On the other hand, if the Senate elevates him to the Supreme Court and he performs as a Justice as he has as a scholar and as he has said a Justice ought to perform, then the Senate will have done a great disservice to women (51% of the population), to black Americans (12% of the population), and indeed to all persons in light of Judge Bork's rejection of the substantive rights of liberty and privacy, today so much a part of our constitutional fabric.

Judge Bork said in the New Republic in 1963:

"Heretical though it may sound to the constitutional sages, neither the Constitution nor the Supreme Court qualifies as a first principle."* Putting aside constitutional sages, it certainly comes as no surprise to this Committee that for black Americans and the majority of American women, the Constitution and the Court are today matters of "first principle." In fact, it is first principle to all Americans.

Much has been written about whether certain rights can be found in the words of the Constitution or are mere

* "New Republic," supra p. 34, at 22.

creations of judges. Black Americans, women, indeed, most Americans, have seldom suffered because there were not enough words already in the Constitution. Most damage has come because former Justices did not read correctly what is in the Constitution. Thus most Americans merely want as Justices men and women who will carry out what is already written. Please reread the decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Its result was reached only because Chief Justice Taney said that a black, however free, and wherever he lived, and even though no longer in slavery or never a slave, could not be a person or a citizen as those simple words were written in the Constitution. The Fourteenth Amendment as written did not require the Justices to set up the phoney scale of separate but equal in Plessy v. Ferguson, 163 U.S. 537 (1896), or interpret the Fourteenth Amendment to permit a state to prohibit women from practicing law. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873). And no literal reading of the Thirteenth and Fourteenth Amendments required the results reached by the Court on the meaning of the Civil Rights Act of 1866 in the Civil Rights Cases 109 U.S. 3 (1883); as has been so clearly demonstrated by the Court's decisions in Jones v. Alfred H. Mayer Company; Runyon v. McCrary, 427 U.S. 160 (1976); St. Francis College v. Al-Khazraji, and Shaare Tefila Congregation v. Cobb. In addition, no literal reading of the Constitution required the Court to hold initially that blacks could be excluded from

the party primaries because primaries were construed as private clubs. Compare Grovey v. Townsend, 295 U.S. 45 (1935) with United States v. Classic, 313 U.S. 299 (1941), and Terry v. Adams, 345 U.S. 461 (1953).

More fundamentally, if anyone can appreciate the full impact of an all-pervasive and intrusive government or media on individual privacy and substantive liberty, it is our elected representatives. No principle is more fundamental to the preservation of a free society composed of diverse and sometimes fractious cultures, philosophies, and individualists. We are held together as a nation by a body of constitutional law constructed on the premise that individual dignity and liberty are the first principles of our society. In this day and age, can we really take the risk of nominating to the Supreme Court a man who fails to recognize the fundamental rights of privacy and "substantive liberty" (more than mere freedom from physical restraint) embedded in the very fiber of our Constitution or Congress's power to enlarge protection for blacks, women and others under § 5 of the Fourteenth Amendment or § 2 of the Fifteenth Amendment?

Having come this far towards a free and open society, we should not stop or turn back the constitutional development that slowly and steadily is removing the vestiges of slavery, of 350 years of legally enforced racial dis-

crimination, and of centuries of irrational discrimination against women.*

* In 1920 the Nineteenth Amendment was adopted which gave women the right to vote. The first case which held that discrimination based upon gender violated the Fourteenth Amendment was Reed v. Reed, 404 U.S. 71 (1971).

Appendix AJUSTICE FRANKFURTER'S APPROACH
TO THE DUE PROCESS CLAUSE OF
THE FOURTEENTH AMENDMENT

In numerous opinions spanning his tenure on the Supreme Court, Justice Frankfurter articulated a strongly-held set of views regarding the proper interpretation of the due process clause of the Fourteenth Amendment. These opinions relate primarily to the substantive and procedural rights of criminal defendants, but a number express Justice Frankfurter's views regarding certain political and privacy rights protected by the due process clause. A recurrent theme is his vigorous debate with Justice Black over whether, and the extent to which, the due process clause incorporated the Bill of Rights, thereby making them applicable to the states. In opposing wholesale incorporation, Justice Frankfurter argued for a flexible yet principled interpretation of "liberty" and "due process" that would both reflect our historical traditions and respond to the evolving demands of a progressive society, and cautioned repeatedly against a rigid conception of the due process clause that would freeze it in time and place.

Justice Frankfurter believed that in determining which "liberties" were protected by the due process clause of the Fourteenth Amendment the Court could not rely on a

simple transplanting of the Bill of Rights. Instead, it had to determine on a case by case basis whether specific liberties were encompassed by the Fourteenth Amendment's prescriptions: no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. He stated that:

These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 [(1934)], or are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 [(1937)].

Rochin v. California, 342 U.S. 165, 169 (1952). Justice Frankfurter believed that the due process clause "expresses a demand for civilized standards . . . [which] neither contain the peculiarities of the first eight amendments nor are they confined to them." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring). Rather than simply mirroring the Bill of Rights, the clause possessed "independent potency," Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring), reflecting a "different but deeper and more pervasive conception," Wolf v. Colorado, 338 U.S. 25, 27 (1949), rev'd, 367 U.S. 643 (1961), and "what may be found within or without [it] . . . must inevitably be left to 'the gradual process of judicial

inclusion and exclusion, as the cases presented for decision shall require," Resweber, 329 U.S. at 471 (quoting Davidson v. Board of Administrators of New Orleans, 96 U.S. 97, 104 (1878)).

In the context of the rights of the accused, this process of "inclusion and exclusion" did not result in a consistently expansive or restrictive interpretation of the due process clause. In Rochin Justice Frankfurter authored the majority opinion holding that the brutal stomach-pumping procedures used to extract incriminating evidence from a defendant's body "shock[ed] the conscience" and violated due process. 342 U.S. at 172. And in Leland v. Oregon, 343 U.S. 790 (1952), Justice Frankfurter dissented from the decision of the Court upholding a state statute placing on defendants who plead insanity the burden of proving their insanity beyond a reasonable doubt, arguing that the statute violated one of the basic notions of a free society. Id. at 802-03. On the other hand, in Wolf v. Colorado, supra, 338 U.S. 25 (1949), he authored the Court's opinion holding that although the Fourth Amendment's prohibition of unreasonable searches and seizures applied to the states, the exclusion of illegally seized evidence is not required by "the minimal standards assured by the Due Process Clause." 338 U.S. at 31. And in Bartkus v. Illinois, 359 U.S. 121 (1959), he wrote the Court's opinion concluding that permitting

successive state and federal prosecutions for different crimes arising from the same acts is not "repugnant to those standards of outlawry which offend the conception of due process outlined in Palko." Id. at 131.

In a number of opinions in cases involving state laws impinging on the exercise of political activities, Justice Frankfurter elaborated his view that "liberty" encompassed what he termed the fundamental right to political privacy and autonomy. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), the Court held that a defendant was denied due process of law when he was adjudged guilty of contempt for declining to answer certain questions put to him in a legislative inquiry regarding his academic activities and knowledge of the Progressive Party. Justice Frankfurter, in a separate opinion concurring in the result which Justice Harlan joined, stated that "the right of a citizen to political privacy," id. at 266-67 (Frankfurter J., concurring), is guaranteed by the due process clause, and "[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling." Id. at 265. In Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951), the Court upheld requirements that public employees state whether they had been members of the Communist Party and take an oath denying past or present membership in, or affiliation with, any organization that

advocated, advised or taught the violent overthrow of the government. Justice Frankfurter concurred in part and dissented in part. He stated that because the oath did not exclude unknown or inadvertent proscribed affiliations, its sheer breadth could "operate as a real deterrent to people contemplating even innocent associations." Id. at 728 (Frankfurter, J., concurring in part and dissenting in part). He concluded that the oath could not survive constitutional scrutiny since it was not "consonant with the Due Process Clause for men to be asked, on pain of giving up public employment, to swear to something they cannot be expected to know. Such a demand is at war with individual integrity." Id. at 728. One year later, in Wieman v. Updegraff, 344 U.S. 183 (1952), the Court struck down a loyalty oath imposed by Oklahoma as a condition to public employment. Justice Frankfurter, in a concurring opinion, wrote that "the Oklahoma law violates those fundamental principles of liberty 'which lie at the base of all our civil and political institutions' and as such are embedded in the due process of law which no State may offend. Hebert v. Louisiana, 272 U.S. 312, 316 [(1926)]." Wieman, 344 U.S. at 196 (Frankfurter, J., concurring).

In these opinions Justice Frankfurter interpreted "liberty" to include certain rights closely related to rights guaranteed by the First Amendment. Yet he based those rights directly and firmly on the due process clause. As he stated in Sweezy, the need to balance "the right of a citizen to

political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection . . . is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause." 354 U.S. at 266-67 (Frankfurter, J., concurring). He held a similar view regarding the Court's decisions which applied to the states the guarantees of the First Amendment. Those decisions, in his view, were based not on any theory of "incorporation," but rather on the

reasoning that the Fourteenth [Amendment] prevents state intrusion upon 'fundamental personal rights and liberties,' that among those rights and liberties are free speech, press, etc., which the First Amendment explicitly protects against federal encroachment, and that, because they are fundamental (not because they are contained in the First Amendment), they fall within the scope of the prohibitions of the Fourteenth [Amendment].

F. Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746, 749 (1965).

Justice Frankfurter's approach concededly left indeterminate the precise contours of the liberty interest protected by the due process clause. As he stated in Adamson, "[t]hese standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." Adamson, 332 U.S. at 68. But in his view this was as it should be, for he believed that due process "is, perhaps,

the least frozen concept of our law -- the least confined to history and the most absorptive of powerful social standards of a progressive society." Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring). As he set forth at greater length in Rochin:

In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. . . . On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, *The Nature of the Judicial Process*; *The Growth of the Law*; *The Paradoxes of Legal Science*. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

342 U.S. at 169-171.

This flexible approach to liberty and due process was repeatedly criticized, especially by Justice Black, for ceding to the Court wide and unfettered discretion. Justice Black objected that the resort to "nebulous standards" such as whether a challenged law or practice "'shocks the conscience', offends 'a sense of justice'" and "runs counter to the 'decencies of civilized conduct'" produced an "accordion-like [approach that] . . . must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." Rochin, 342 U.S. at 175, 177 (Black, J., concurring) (footnote omitted). He protested that such an ad hoc approach arrogated to the Court a license "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." Adamson, 332 U.S. at 90 (Black, J., dissenting).

Justice Frankfurter was not untroubled by the open-ended nature of his approach. Indeed, on more than one occasion he acknowledged the possibility that the "broad terms" of the due process clause "may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. Resweber, 329 U.S. at 468 (Frankfurter, J., concurring). See also Leland, 343 U.S. at 807 (Frankfurter, J., dissenting). Yet, he responded,

"[t]hat is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court." Resweber, 329 U.S. at 468. See also Sweezy, 354 U.S. at 267 (1957) (Frankfurter, J., concurring). The exercise of judicial judgement is unavoidable, he stated, and:

[t]o believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim.

Rochin, 342 U.S. at 171. That judgment must be exercised did not mean, however, that "judges are wholly at large."

Adamson, 332 U.S. at 68. What is required in each case is

an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Rochin, 342 U.S. at 172. He recognized that "[t]o practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and

self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared." Id. at 171. "But," he stressed, "these are precisely the pre-suppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power. Id. at 171-72.

Appendix BJUSTICE HARLAN
AND THE DUE PROCESS CLAUSE
OF THE FOURTEENTH AMENDMENT

Justice John Harlan shared many of Justice Frankfurter's views regarding the interpretation of the liberty interest encompassed within the due process clause of the Fourteenth Amendment. Like Justice Frankfurter, he believed that Justice Cardozo's opinion in Palko v. Connecticut,* 302 U.S. 319 (1937), set forth the proper approach. And like Justice Frankfurter, he argued for a conception of the due process clause that was flexible, independent of but drawing support from the Bill of Rights, open to reexamination and evolution, and that called for the exercise of considered judgments by courts and depended on the exercise of disciplined judicial self-restraint.

The majority of Justice Harlan's opinions interpreting the due process clause concerned the rights of criminal defendants and thus carried on the Frankfurter-Black incorporation debate. But the clearest and most expansive expositions of Justice Harlan's views on liberty and due process are found

* The holding in Palko, that federal double jeopardy standards were not applicable against the states, was overruled in Benton v. Maryland, 395 U.S. 784 (1969).

in Poe v. Ullman, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting), and Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring in the judgment), which extended the substantive due process analysis into the realm of personal privacy.

In Poe the Court declined to reach the merits of a constitutional challenge to Connecticut's ban on the use of contraceptives. In his dissenting opinion Justice Harlan disagreed with the dismissal of the challenge on procedural grounds, and stated that on the merits the Connecticut law should be struck down as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." 367 U.S. at 539. Acknowledging that the challenges to the Connecticut law drew "their basis from no explicit language of the Constitution," id., he proceeded to set forth at some length what he thought to be the appropriate constitutional framework:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the

traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continually to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting).

367 U.S. at 542-44 (Harlan, J., dissenting) (citations omitted). Turning to the Connecticut law banning the use of contraceptives, he stated:

This enactment involves what, by common understanding throughout the English speaking world, must be granted to be a most fundamental aspect of "liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny." Skinner v. Oklahoma, supra, [316 U.S. 535,] [] 541, 549 [(1942)]

That aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection of two places only. These are the Third Amendment, relating to the quartering of soldiers, and the Fourth Amendment, prohibiting unreasonable searches and seizures. . . .

It is clear, of course, that this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home. What the statute undertakes to do, however, is to create a crime which is grossly offensive to this privacy, while the Constitution refers only to methods of ferreting out substantive wrongs, and the procedure it requires presupposes that substantive offenses may be committed and sought out in the privacy of the home. But such an analysis forecloses any claim to Constitutional protection against this form of deprivation of privacy, only if due process in this respect is limited to what is explicitly provided in the Constitution, divorced from the rational purposes, historical roots, and subsequent developments of the relevant provisions.

367 U.S. at 548-49. (Harlan, J., dissenting) (citations and footnotes omitted).

In Griswold the Court reached the merits and struck down the Connecticut law, concluding that it impermissibly infringed on marriage, a "relationship lying within the zone of privacy created by several fundamental

constitutional guarantees." 381 U.S. at 485. Justice Harlan wrote a separate opinion concurring in the judgment but did not agree with the majority's analysis. He rejected the majority's search for "some right assured by the letter or penumbra of the Bill of Rights," 381 U.S. at 499, and stated that the proper constitutional analysis required an examination of whether the law "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violated basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325." Griswold, 381 U.S. at 500. Addressing the concern that his approach invited judges to "introduc[e] their own notions of constitutional right and wrong," id. at 501, he stated that even provisions more "specific" than the due process clause "lend themselves as readily to 'personal' interpretations." Id. Moreover, he cautioned, it was illusory to presume that judicial restraint could be assured by the "interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause," id. at 502. Instead, judicial restraint

will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See Adamson v. California, 332 U.S. 46, 59 [(1947)(Frankfurter, J., concurring)].

Griswold, 302 U.S. at 501.

Justice Harlan also wrote at length regarding the nature of the liberty interest protected by the due process clause in cases involving the rights of criminal defendants, and his opinions echo many of the themes elaborated by Justice Frankfurter in connection with the "incorporation" debate. His view that the essence of liberty was "fundamental fairness" led him to interpret the due process clause to require states to afford defendants a right to confront the witness against him, Pointer v. Texas, 380 U.S. 400, 408 (1965) (Harlan, J., concurring in the result), to present proof beyond a reasonable doubt in determination of juvenile delinquency based on criminal conduct, In Re Winship, 397 U.S. 358, 368 (1970) (Harlan, J., concurring), and to provide counsel to indigent defendants. Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring). At the same time, he interpreted the due process clause to permit a state to try a criminal defendant without a jury, Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting), to retry a defendant without running afoul of double jeopardy restrictions, Benton, 395 U.S. at 801 (1969) (Harlan, J., dissenting), and to imprison a person for refusing to give evidence which may incriminate him. Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

Regardless of whether he interpreted the due process clause expansively or restrictively, he consistently advanced his view of "liberty" and "due process" articulated in his dissenting opinion in Poe. Thus, in his dissenting opinion in Duncan, he stated that "the very breadth and generality of the [Fourteenth] Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of 'liberty' and 'due process of law' but that the increasing experience and evolving conscience of the American people would add new 'intermediate premises.'" 391 U.S. at 175. To restrict due process to "rules fixed in the pas[t] . . . 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'" Id. at 176-77 (footnote omitted). Similarly, in Malloy, in which Harlan wrote a dissenting opinion rejecting the incorporation of the Fifth Amendment's prohibition against self-incrimination, he "accepte[d] and agree[d] with the proposition that continuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the community's sense of justice may in time lead to expansion of the protection which due process affords." 378 U.S. at 15.

Like Justice Frankfurter, Justice Harlan recognized that his approach left the precise scope of liberty and due process indeterminate, and that "[s]uch an approach may not

satisfy those who see in the Fourteenth Amendment a set of easily applied 'absolutes' which can afford a haven from unsettling doubt." Id. at 28. Nonetheless, he insisted, his approach is "truer to the spirit which requires this Court constantly to re-examine fundamental principles and at the same time enjoins it from reading its own preferences into the Constitution." Id. at 28-9.

Appendix C

THE ROLE OF STARE DECISIS
IN SUPREME COURT CONSTITUTIONAL ADJUDICATION
AND
JUDGE BORK'S VIEWS WITH RESPECT TO PRECEDENTS

It has long been accepted wisdom that the Supreme Court is not meaningfully bound by precedents in constitutional cases. The doctrine of stare decisis et non quieta movere -- stand by the precedent and do not disturb the calm -- is generally viewed by the Supreme Court as a useful, but far from absolute, guiding principle, and Supreme Court pronouncements have typically asserted that in constitutional cases that doctrine should be given "less weight" than in other types of cases. In reality, "less weight" translates into "no weight" whenever a majority of the Court is inclined to overrule a prior decision, or a particular Justice finds the precedent inconsistent with his or her strongly-held views on a particular issue.

One of the earliest statements by the Court concerning the limited role of stare decisis in Supreme Court cases can be found in The Passenger Cases, 48 U.S. (7 How.) 283, 12 Law. Ed. 702 (1849). There Chief Justice Taney wrote:

After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by decision of this court. I do not, however,

object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Id. at 470. Chief Justice Taney did not elaborate a rationale for his views, a task that was left to Justice Brandeis in an oft-cited dissenting opinion in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1931). In his opinion Justice Brandeis drew a distinction between constitutional and other cases, subsequently invoked by the Court on numerous occasions, as the basis for relaxing the application of stare decisis in constitutional cases:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Id. at 406-08 (footnotes and citations omitted).

The frequency with which the Court has overruled its prior constitutional decisions has been well-documented. See Maltz, "Some Thoughts on the Death of Stare Decisis in

Constitutional Law," 1980 Wisc. L. Rev. 467, 494-96 (1980); Blaustein & Field, "'Overruling' Opinions in the Supreme Court," 57 Mich. L. Rev. 151, 167 (1958); Douglas, "Stare Decisis," 49 Colum. L. Rev. 735, 743 (1949); Burnet, 285 U.S. at 408 n.3, 409 n.4 (Brandeis, J., dissenting). The Court has not always felt compelled in each such case to address overtly the departure from the doctrine of stare decisis. See, e.g., National League of Cities v. Usery, 426 U.S. 833, 879 (1976) (Brennan, J., dissenting) (chastising majority for overruling Maryland v. Wirtz, 392 U.S. 183 (1968), "[w]ithout even a passing reference to the doctrine of stare decisis"), rev'd, 469 U.S. 528 (1985); Batson v. Kentucky, 106 S. Ct. 1712, 1721 (1986). In a number of recent cases in which the Justices have explicitly addressed the doctrine of stare decisis, their pronouncements evidence a willingness, in some instances eagerness, to reexamine or overrule decisions they consider to be in error.

In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), for instance, Justice O'Connor elaborated her views on stare decisis in the course of criticizing the framework underlying the Court's decision in Roe v. Wade, 410 U.S. 113 (1973):

The Court adheres to the Roe framework because the doctrine of stare decisis "demands respect in a society governed by the rule of law." Ante, at 420. Although respect for stare decisis cannot be challenged, "this

Court's considered practice [is] not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases." Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962). . . . In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." Smith v. Allwright, 321 U.S. 649, 665 (1944) (footnote omitted).

462 U.S. at 458-59 (O'Connor, J., dissenting). Similarly Justice White in Richard Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986) (White, J., dissenting), wrote at length concerning his views on stare decisis in the context of urging the Court to overrule Roe v. Wade:

The Court has therefore adhered to the rule that stare decisis is not rigidly applied in cases involving constitutional issues, see Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (opinion of Harlan, J.), and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. Stare decisis did not stand in the way of the Justices who, in the late 1930s, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, see United States v. Darby, 312 U.S. 100 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Nor did stare decisis deter a different set of Justices, some fifteen years later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. Brown v. Board of Education, 347 U.S. 483 (1954). In both instances, history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of stare decisis.

Thornburgh, 106 S. Ct. at 2193.

Perhaps the most candid acknowledgement by the Justices of the limited hold that precedents have on the Court can be found in the exchange of views in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), which overruled National League of Cities. Justice Blackman, writing for the majority, justified the departure from established precedents as required:

We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See United States v. Darby, 312 U.S. 100, 116-17 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

Garcia, 469 U.S. at 557 (footnote omitted). Justice Rehnquist, in a dissenting opinion, decried the abandonment of National League of Cities and confidently predicted that the principles underlying that decision would "in time again command the support of a majority of this Court." Id. at 580 (Rehnquist, J., dissenting). Justice O'Connor, in a separate dissenting opinion, reaffirmed her commitment to the principles enunciated in National League of Cities and stated that she "share[d] Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility . . . acknowledged by National League of Cities and its progeny." Id. at 589 (O'Connor, J., dissenting).

Stare decisis is, of course, invoked on occasion by a majority declining to overrule a prior decision or by a dissenting Justice urging adherence to prior authority. In Arizona v. Rumsey, 467 U.S. 203 (1984), for instance, Justice O'Connor, writing for the majority in rejecting the petitioner's suggestion that the Court overrule Bullington v. Missouri, 451 U.S. 430 (1981), stated that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification. See, e.g., Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Smith v. Allwright, 321 U.S. 649, 665 (1944)." Arizona, 467 U.S. at 212. Similarly, Justice Powell in Akron wrote in defense of Roe v. Wade that "stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." 462 U.S. at 420 (footnote omitted). See also Oregon v. Kennedy, 456 U.S. 667, 691-2 n.34 (1982) (Stevens, J., concurring (quoting Green v. United States, 355 U.S. 184, 215 (1957)) (Frankfurter, J., dissenting) ("We should not be so unmindful, even when constitutional questions are involved, of the principle of stare decisis. . . . [T]he conviction borne to the mind of the rightness of an overturning decision must surely be of a highly compelling quality to justify overruling a well-established precedent when we are presented with no

considerations fairly deemed to have been wanting to those who preceded us.")

Notwithstanding the occasional admonition to adhere to precedents absent "special" or "compelling" reasons, the prevailing view among the Justices appears to be that precedents do not represent a serious obstacle to the overruling of prior constitutional decisions perceived as erroneous. Nearly 45 years ago Justice Reed in Smith v. Allwright, 321 U.S. 649 (1944), summarized succinctly the Court's view of the binding quality of precedent in constitutional cases when he wrote: "[W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. . . . This has long been accepted practice, and this practice has continued to this day." Id. at 665 (footnotes omitted). Those words are equally applicable today.

As indicated in the testimony, Judge Bork has made a number of statements regarding how a Justice should handle constitutional decisions with which he disagrees. These are set forth below:

Since the legislature can do nothing about the interpretation of the Constitution given by a court, the Court ought to be always open to rethink Constitutional problems. . . .

. . . [A]t bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent.*

Supreme Court justice[s] always can say . . . their first obligation is to the Constitution, not to what their colleagues said 10 years before.**

[I]f a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court.***

Certainly, at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended.****

* "A Talk with Robert H. Bork," District Lawyer, v. 9. no. 5, p. 32, May/June 1985.

** "Justice Robert H. Bork: Judicial Restraint Personified," California Lawyer, May 1985.

*** Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1, 13 (hereinafter "1982 Confirmation Hearing").

**** Transcript, Speech to the Federalist Society, January 31, 1987, p. 126. The same argument is handwritten in the prepared text of the speech, p. 4. ("no problem w/originalist judge overruling non-originalist decision").

ADDITIONAL VIEWS OF SENATOR LEAHY

Although I join the majority report on the nomination, I write separately to explain the particular reasons why I recommend against confirmation of Robert Bork to be Associate Justice of the Supreme Court.

I am not opposed to Robert Bork, the person. I have great admiration for his intellect, scholarship, and skill in crafting judicial opinions. Nor do I question his personal decency and integrity. His forthrightness in responding to the most probing and far-ranging questioning by Committee members is unparalleled, and sets a high standard that future nominees will have to work hard to match. In the hearings, Judge Bork handled himself in a way that commands not only our respect, but also our admiration for the support shown by his impressive family.

Robert Bork, the person, has my praise and respect. Robert Bork, the nominee to the Supreme Court, does not have my vote, and the President does not have my consent to this nomination.

Confirming this nominee could alter the direction the Supreme Court takes into the next century. My children will live most of their lives in that century, and my vote speaks to the legacy I would leave them—and all other Americans.

The central issue is this nomination is not Robert Bork, the person, but Robert Bork's approach to the Constitution and to the role of the Supreme Court in discerning and enforcing its commands. The central issue is his judicial philosophy. When the hearings began, I said that Judge Bork's judicial philosophy is comprehensive and clearly stated. It is also a record of consistent and forceful opposition to the main currents the Supreme Court has taken on a wide range of issues that touch on the basic freedoms of the American people. While in some areas Judge Bork departed from this longstanding record in his testimony before the Judiciary Committee, I am not convinced that his fundamental approach to constitutional principles has changed. This is a key factor in my vote on this nomination. Let me explain why.

With Judge Bork, as with any Supreme Court nominee, the record before the Senate is a record of the past: what the nominee has said and done up to the moment the Senate makes its decision. But that decision is a referendum on the future.

Whoever succeeds Justice Powell on the Supreme Court will probably serve well into the 21st Century. The Senate should confirm Justice Powell's successor only if we are persuaded that the nominee has both the commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years.

When the Framers of the Constitution met in Philadelphia two centuries ago, they decided that the appointment of the leaders of the judicial branch of government was too important to leave to

the unchecked discretion of either of the other two branches. They decided that the President and the Senate must be equal partners in this decision, playing roles of equal importance. The 100 members of the United States Senate, like the Chief Executive, are elected by all the people. And all the people have the right to expect that we will approach our task with care and concern for the importance of this decision for the future of our Republic.

I cannot vote for Judge Bork unless I can tell the people of Vermont that I am confident that if he were to become *Justice* Bork, he would be an effective guardian of their fundamental rights.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would aggressively defend their freedom to think, speak and write as they please—without the threat of censorship or reprisal from any level or branch of government. Based on the record before me, I cannot tell the people of Vermont that Robert Bork would champion their First Amendment rights to free speech.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would prevent government from intruding into the most intimate and private decisions of family life, as the Constitution provides. Based on the record before me, I cannot tell the people of Vermont that Judge Bork recognizes their right to privacy as one of their most fundamental liberties, and that he will act forcefully on that recognition.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would comprehensively uphold the constitutional right to be free of unfair discrimination by any branch or level of government. Based on the record before me, I cannot tell the people of Vermont that Judge Bork will unstintingly employ the equal protection clause of the Fourteenth Amendment to block government actions based on sexual discrimination and other forms of unfounded prejudice.

From my own studies and from the nomination hearings, I know much about Judge Bork and his judicial philosophy, and I am not convinced that the nominee will protect those freedoms into the next century. Therefore, I must recommend a vote against the nominee.

As Senators decide how to vote on this nomination, much will be made of the subject of "confirmation conversion." This phrase summarizes some of the reasons why I have found this decision so difficult. But like any catch phrase, it may suggest different things to different people. Some of these connotations may be misleading.

At the hearings, Judge Bork told the Judiciary Committee many things he has never told anyone else before—at least not in public—about his approach to fundamental constitutional issues. The issue is not whether he was candid in those aspects of his sworn testimony which seems to contradict so many basic thrusts of his prior writings and speeches. Judge Bork testified under oath, and I have no reasons to think that a man of such integrity would have testified with less than complete truthfulness. The real issue is what weight the Senate should give to these newly expressed views.

There is a pattern to the new views that Judge Bork disclosed for the first time at the hearings. His evolving thinking on free speech

questions, for example, has come to rest at a point near the consensus that was reached by the Supreme Court and by most legal scholars some twenty years ago. On constitutional questions that still excite controversy within the legal mainstream—for example, the right of marital and family privacy—Judge Bork's views have scarcely changed at all.

This pattern shows that Judge Bork's views are now different from some of the more isolated positions he previously sought to defend. But it also shows that, at this point in his long career, he still does not demonstrate a passion for vindicating the individual rights of Americans that matches his passion for a rigorous and coherent legal theory of the Constitution.

A key element of the issues the Senate must confront on this nomination is whether Judge Bork's newly announced perspectives are likely to overpower the deeply considered and well documented intellectual habits of a long career as a legal philosopher. Our focus, once again, must not be limited to what Judge Bork now says about the established precedents he so forcefully attacked in the past. Our focus must be on the judicial philosophy that Judge Bork would bring to the constitutional controversies of the 21st Century.

Many distinguished lawyers testified before the Judiciary Committee on this nomination. But a non-lawyer, the novelist William Styron, went to the heart of the matter when he said that the Senate must decide whether Judge Bork's newly expressed views reflect "a matter not of passing opinion but of conviction and faith."¹ Measured against that standard, Judge Bork's testimony of earlier this month mitigates some of his previous statements, but does not erase them from the record which the Senate must consider.

When a nominee for a cabinet position comes before a Senate committee for confirmation hearings, it is not unusual for Senators to seek specific commitments as to actions the nominee will or will not take if confirmed. Senators may even condition their vote on these commitments. But a lifetime appointment to the federal judiciary is entirely different from an appointment to an Executive Branch position. In the case of a nominee to the Supreme Court, it would be improper for members of the Judiciary Committee to seek such commitments, and it would be unthinkable that any nominee would make them. The Committee's job is not to extract commitments, but to exercise judgment about the probable course of the nominee's long-term performance on the Supreme Court. Recent changes in the nominee's views, whether or not they are considered "confirmation conversions," form an important part of that judgment.

The central issue in this nomination is the question of Judge Bork's judicial philosophy: his approach to the Constitution and to the role of the courts in discerning and enforcing its commands. During the confirmation hearings that are now winding up, we heard a great deal of testimony, both from the nominee himself

¹ Transcript of Confirmation Hearings on the Nomination of Robert H. Bork (hereafter "Transcript"), 9/22/87, at 212.

and from other witnesses, about many aspects of Judge Bork's judicial philosophy.

But three issues stand out. Each is drawn from a phrase from the Constitution that evokes a core value of the American system of self-government: "freedom of speech," "liberty," and "equal protection of the laws." I am not persuaded that Judge Bork is philosophically committed to the historical role of the Supreme Court to protect these core values against actions by one of the branches or levels of government that would threaten the rights of individual Americans.

The first issue is one of freedom. The constitutional provision that embodies it is found in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech." The history of judicial interpretations of this general prohibition underscores how essential this freedom is to our constitutional system. It is the freedom of every American to think, speak, and write as we please, on any subject and in any medium, without the threat of censorship or reprisal by any branch of government at any level.

This is a freedom that every American holds dear. But it has a special meaning for me. As the son of a Vermont printer, I grew up in a family which venerated this freedom above almost any other. So when I began to read Judge Bork's interpretation of the First Amendment, I was disturbed and alarmed.

The question of free speech was the centerpiece of the most significant and most widely cited law review article written by the nominee on the issue of judicial interpretation of the Constitution. Three strands of Judge Bork's view of the First Amendment concerned me. First, he emphatically asserted that "constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression."² Second, Judge Bork argued that "within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law."³ The third theme of Judge Bork's views on free speech that I found troubling was developed in greater detail in some of his subsequent speeches and articles, in which he argued that the First Amendment should not prevent state and local governments from punishing people who speak, even on "explicitly political" topics, in a way that the majority of the community finds "offensive."⁴

To understand why I was so concerned about these views, it is worth reminding ourselves what freedom of speech really means under the law today. In case after case, the Supreme Court has been called upon to apply the general words of the First Amendment to a variety of concrete factual situations. Those cases have established the practical contours of freedom of speech in each of the areas questioned by Judge Bork.

²Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 20 (1971) (hereafter "Indiana LJ").

³*Id.*

⁴Bork Speech at Justice and Society Seminar, 8/13/85, at 6; Bork Speech at University of Michigan, 2/5/79 (hereafter "Michigan Speech"), at 18.

First, consistent with the First Amendment, these cases affirm that, in America, all kinds of speech are protected: speech that directly concerns the process of self-government, but also speech that has nothing to do with politics.⁵ The candidate on the stump and the orator on the soapbox may speak without fear of government censorship or reprisal. But so also may the scientist in the laboratory and the entertainer on the stage or screen, large or small. The author of a best-selling novel is protected by the First Amendment; so is the poet publishing in an obscure journal. The painter, the sculptor, the composer may follow their muses wherever they may lead, free of the fear that official disfavor may squelch or constrain their creativity.

Second, a series of Supreme Court cases affirms that government may not arbitrarily suppress even speech that confronts government with a challenge to its legitimacy or with advocacy of disobedience of law. Only when such speech presents the danger of imminent lawless activity may it be curbed.⁶

Finally, it is clear that the First Amendment forbids censorship not only when the government dislikes what we say, but also when it dislikes how we say it. When speech is not legally obscene, the majority of the community may consider it offensive, or even immoral, but the Constitution will not allow the majority to gag the minority—even a minority of one—on that account.⁷

Taken together, these strands of the First Amendment's free speech clause form the backbone of a system of freedom of expression unparalleled in any other nation. We sometimes overlook the vital part that this system has played in making America the most vibrant, creative, prosperous and confident society in the world today. Freedom of speech has guaranteed the diversity of thought that keeps our democracy vital as it enters its third century.

When Judge Bork testified before the Judiciary Committee, I questioned him extensively about each troubling aspect of his approach to the application of the First Amendment guarantee of freedom of speech. His answers were detailed and comprehensive.

Judge Bork's testimony was most nearly reassuring on the question of First Amendment protection for non-political speech. Referring to the well established principle that speech is protected regardless of its lack of relationship to the political process, Judge Bork said, "That is what the law is, and it is law I accept."⁸ While this testimony was welcome, it still must be read against the background of Judge Bork's prior statements on the issue.

Judge Bork may have long ago abandoned the "bright-line" distinction between protected political and unprotected non-political speech, but his responses to interviewers as recently as this past May and June clearly state that the existence of First Amendment protection should be affected by where speech falls in relation to a "wavering line" between speech that feeds into the "way we

⁵ See *Abod v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection").

⁶ E.g. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hess v. Indiana*, 414 U.S. 105 (1973).

⁷ E.g. *Cohen v. California*, 403 U.S. 15 (1971).

⁸ Transcript, 9/17/87, at 192.

govern ourselves" and speech that does not, a line that must be drawn on a "case by case basis."⁹

When he came before the Judiciary Committee, Judge Bork conceded that this line, whether bright or "wavering," is irrelevant to the scope of the First Amendment.¹⁰ By his confirmation testimony, Judge Bork accepted a consensus that has existed for decades.

On the question of protection for speech that advocates the violation of law, my questioning focused on Judge Bork's evaluation of the leading Supreme Court case on the subject, the 9-0 decision in the 1969 case of *Brandenburg v. Ohio*.¹¹ Judge Bork sharply criticized this decision on a number of occasions and at least once described it as "fundamentally wrong."¹² When I asked him about it, Judge Bork stated, for the first time in public that "the *Brandenburg* position . . . is okay; it is a good position."¹³ The next day, he gave a slightly different response to a question from Senator Specter: "I think *Brandenburg* . . . went too far, but I accept *Brandenburg* as a judge and I have no desire to overturn it. I am not changing my criticism of the case. I just accept it as settled law."¹⁴

Finally, on the question of whether a community can punish even political speech because it uses offensive words, the leading case, *Cohen v. California*, struck down a conviction of a young man for disorderly conduct for using a four-letter word to express his opposition to the Selective Service Act.¹⁵ Judge Bork consistently has criticized this decision, but his testimony on his current position was somewhat ambiguous. While he embraced the general principle that "no community can override any guarantee anywhere in the Constitution,"¹⁶ he also reiterated his long-standing criticism of the reasoning of Justice Harlan in the *Cohen* case, stating "I feel precisely the same way as I did" on the occasions of his previous attacks on the decision.¹⁷

The testimony on all three of these points is inconsistent with much of what Judge Bork had said on these topics as recently as a few months before he walked into the Senate Caucus Room as a nominee for the Supreme Court. A review of Judge Bork's decisions as an appellate judge in First Amendment cases does not resolve these inconsistencies. Most of these decisions involve either speech that Judge Bork deemed political, and therefore indisputably protected, or issues rather closely controlled by Supreme Court precedent that any lower court judge is bound to apply.¹⁸ Interestingly, in the only majority decision by Judge Bork that the Supreme Court has ever decided to review, the nominee sustained a statute that permits the government to discriminate between competing speakers on political topics based on the content of the speech.¹⁹

⁹ Bork Interview for WorldNet, June 10, 1987 (hereafter "WorldNet Interview"), at 26; Bork Interview with Bill Moyers, May 28, 1987, at 35.

¹⁰ Transcript, 9/17/87, at 193.

¹¹ 395 U.S. 444 (1969).

¹² Michigan Speech, at 21.

¹³ Transcript, 9/16/87, at 115.

¹⁴ Transcript, 9/17/87, at 206.

¹⁵ 403 U.S. 15 (1971).

¹⁶ Transcript, 9/18/87, at 287.

¹⁷ *Id.* at 288.

¹⁸ *E.g., Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 778 F.2d 35 (D.C. Cir. 1985).

¹⁹ *See Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986).

The overall picture presented by Judge Bork's free speech decisions and his writings on the subject belies the extravagant claim made by some of the proponents of this nomination that he is at the forefront of modern free speech jurisprudence. At best he is somewhere in the pack and running to catch up.

While the degree of inconsistency may be debated, the only purpose of this review of the past record is to aid in anticipating his approach to free speech questions in the future, if he is confirmed.

It is quite likely that in the future, some American will say, in a speech or a book or a television program or in some other medium, something that has nothing to do with the political process, but that nevertheless raises the ire of government. It is also likely that some speaker will advocate the disobedience of a law that he finds unjust, even if it is not in fact later found to be unconstitutional. It is equally likely that a future speaker will for whatever reason choose to express his views on political subjects in a manner that many others, perhaps almost all of us, find crude, shocking or offensive. And each of these events may well arise in a context of heated emotions, of social turmoil, even of crisis, when our deepest attachment to freedom of even unpopular speech is most sorely tested.

Our First Amendment forbids government censorship or reprisal against these speakers. In our constitutional system, that is a matter, in William Styron's words, of "conviction and faith."²⁰ The question before the Senate is the depth and strength of Judge Bork's attachment to these fundamental principles, which he so incisively criticized for years—and which he came to accept only recently.

Certainly, Judge Bork's forthright testimony before the Judiciary Committee makes this a close question. But in the end, I am not persuaded that Justice Bork would be an energetic and effective guardian of this most basic of our constitutional freedoms. Belated acceptance of these well established principles does not match what we expect of a Supreme Court Justice.

The second great constitutional theme which was explored in the hearings on Judge Bork's nomination is an issue of equality. The words of the Fourteenth Amendment to the Constitution are, once again, grand but general: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The Judiciary Committee questioned Judge Bork extensively on his views on issues of racial equality, and of the powers of the courts and Congress to take steps to eradicate the racial discrimination that the Fourteenth Amendment was originally adopted to combat. To me, one of the most troubling aspects of Judge Bork's philosophy of equality under the Constitution is the application of this general language to a problem that modern Americans perceive in a far different light than was perceived by the authors of the Fourteenth Amendment: unfair governmental discrimination on the basis of gender.

The problem with Judge Bork's judicial philosophy in this area can be posed in simplistic terms: does he believe that the equal pro-

²⁰ Transcript, 9/22/87, at 212.

tection clause applies to women? The answer is equally simplistic. Of course women are included within the phrase "any person," and therefore a law that discriminates on the basis of gender can be challenged under the equal protection clause.

The more difficult question is this: by what standard should a court evaluate a challenge to a law that discriminates between men and women? Is it comparable to a law that provides different tax rates for the sale of apples and oranges? That sort of distinction is almost never found to deny "equal protection of the laws." Or is the proper standard more like the scrutiny that will be given to a law which treats members of different races differently, a form of discrimination which is virtually never permitted under the Constitution?

The Supreme Court precedents on this subject are more recent than in the free speech area, but they establish an important principle. As eight of the nine Justices agreed in a 1980 decision, laws that treat men and women differently will be upheld only if they "serve important governmental objectives" and use "means . . . substantially related to the achievement of these objectives."²¹ In other words, such laws are not always inconsistent with the Fourteenth Amendment, but they come into court with two strikes against them.

Judge Bork's statements on this issue prior to the hearing disagree with this approach. From 1971, when he wrote that "the Supreme Court has no principled way of saying which non-racial inequalities are impermissible,"²² to June 10, 1987, when he told an interviewer that he thought "the equal protection clause probably should have been kept to things like race and ethnicity,"²³ there was no indication that Judge Bork supported or even accepted the recent attitude of judicial skepticism toward laws that embody sex discrimination. His record as a judge on the D.C. Circuit Court of Appeals sheds little light on the issue, since he has written only one opinion in a case involving the treatment of sex discrimination under the equal protection clause, and in that case his decision did not reach the merits of the claim.²⁴

Judge Bork's testimony at the hearing fleshed out his approach to this question. He argued that the courts ought to ask the same questions of any statute challenged under the equal protection clause. A law that treats members of different groups differently would be sustained if there were a reasonable basis for the distinction, but would be struck down if a "reasonable basis" were lacking.²⁵ Judge Bork concluded that this approach "would arrive at . . . virtually all of the same results that the majority of the Supreme Court has arrived at," using the existing methods of equal protection analysis in sex discrimination cases. "There is really no difference," he testified, "except in the methodology."²⁶

²¹ *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980).

²² *Indiana LJ*, at 11.

²³ *WorldNet Interview*, at 12.

²⁴ *Cosgrove v. Smith*, 697 F.2d 1125, 1134 (D.C. Cir. 1983) (Bork J., concurring in part and dissenting in part).

²⁵ Transcript, 9/17/87, at 28.

²⁶ *Id.*

It was reassuring to hear that Judge Bork would have reached the same result (though by a different route) as the Supreme Court has reached in striking down state laws that reflect unfounded stereotypes about the proper role of women in modern society. But once again, our focus on his attitudes toward past decisions is useful mainly as an element of predicting the course toward which he would guide the Supreme Court in the future if he is confirmed. Viewed in that light the nominee's testimony on equal protection issues raises some serious concerns. I will mention four here.

First, during the first century of litigation under the equal protection clause, the Supreme Court followed an approach to claims of sex discrimination that is disturbingly similar to the analysis Judge Bork presented to the Judiciary Committee. In case after case, the Supreme Court found it "reasonable" to bar women from certain professions and occupations, and otherwise to limit their opportunities compared to those available to men.²⁷ Accordingly, it upheld state laws reflecting a level of blatant discrimination that would be quite offensive to the ideals of equality that we as a society hold today. Indeed, the Supreme Court never struck down a law that treated men and women differently until 1971, when, not coincidentally, it began to abandon the "rational basis" standard for measuring such laws against the equal protection clause.²⁸ Perhaps it is mostly a matter of nomenclature, but Judge Bork's "reasonable basis" approach summons up unwelcome memories of the "bad old days" that are just as offensive to those concerned about women's rights as memories of the era of "separate but equal" are for people concerned about racial justice in our society.

The second problem is related to the first. To ask the Justices of the Supreme Court to decide, without further elaboration, what is "reasonable" discrimination is to invite a highly subjective decision. To use the facts of one celebrated case as an example, the Justices of the 19th Century decided that it was "reasonable" for the state of Illinois to forbid Myra Bradwell from practicing law because of her gender.²⁹ They reached that conclusion by using the same sort of unstructured, unpredictable analysis that Judge Bork says he would bring to the Supreme Court of the 21st Century. Ironically, this method of applying the general words of the Constitution to the particular facts before the Court smacks of the free-floating, "unprincipled" decisionmaking that Judge Bork has never ceased to criticize in Supreme Court precedents.

The unpredictability of this approach is a serious liability. This would be a concern not only to women who may wish to challenge laws that they believe are unfairly discriminatory. It would also be unfair to state the local governments, which every day consider actions that treat different groups of people differently because of gender or other factors. While the current state of the law may not provide as much predictability as these levels of government would like, it seems clearly preferable to a situation in which any distinction drawn by any government can be struck down whenever five members of the Supreme Court, for whatever subjective reason any

²⁷ E.g., *Goesart v. Clery*, 335 U.S. 464 (1948); *Bradwell v. Illinois*, 83 U.S. 130 (1873).

²⁸ Statement of Sylvia A. Law, 9/25/87, at 5.

²⁹ See *Bradwell v. Illinois*, 83 U.S. 130 (1873).

of them might choose, decide that the distinction is "unreasonable."

The third problem with Judge Bork's "reasonable basis" approach to questions of constitutional equality can be illustrated by reference to one specific sex discrimination precedent which he has discussed both before and during the hearings. In 1976, the Supreme Court struck down a state law establishing a lower minimum drinking age for women than for men.³⁰ Judge Bork said about this case in an interview last June that "when the Supreme Court decided that (this distinction) violated the equal protection clause, I thought . . . that was to trivialize the Constitution and to spread it to areas it did not address."³¹

In response to questions from Senator DeConcini, Judge Bork commented as follows about this case:

"I thought, as a matter of fact, the differential drinking age probably is justified . . . They had a lot of evidence about differential drinking patterns and resultant troubles, automobile accidents and so forth, upon which they based that differential."³²

Although the nominee refrained from offering a final opinion on whether the case was properly decided, he said enough to raise another concern about his approach to the entire subject.

Whatever the Justices of the past thought was "reasonable," and whatever the Justices of the future might think is "reasonable," it is disturbing that Justice Bork might find "reasonable" a law that treats individual men and women differently based on overall statistical evidence about men and women as a whole. That approach does not bode well for a principle that lies close to the heart of our constitutional commitment to equality under law: that the contribution of every American citizen should be limited only by his or her own efforts, and not by generalizations about the gender or other group to which he or she belongs.

This raises a fourth problem with Judge Bork's newly articulated views on equal protection. Supreme Court precedents have established the axiom that laws that treat members of different races differently are almost never constitutional. But surely it is possible to make accurate statistical generalizations about different racial groups. Taken as a whole, black and white populations differ in life expectancy, for example, or in the prevalence of certain diseases. If such statistical generalizations are enough to establish a "reasonable basis" for a discriminatory law, then the prohibition against laws that make racial distinctions could logically be in jeopardy.

In the final analysis, what troubles me about Judge Bork's testimony on the issue of constitutional equality is not its inconsistency with his previous statements on the subject, although certainly some inconsistency exists. Rather, I am concerned about how a Justice with his judicial philosophy would respond to an ever more powerful and beneficial trend in American society: the drive to eliminate unfounded barriers to full participation in the society,

³⁰ *Craig v. Boren*, 429 U.S. 190 (1976).

³¹ WorldNet Interview, at 13.

³² Transcript, 9/17/87, at 35-36.

not only be racial minorities and women, but by members of other groups disadvantaged by prejudice, ignorance, and superficial stereotyping.

We must ask ourselves what forms this trend will take in the constitutional controversies of the 21st Century. In a nation whose birth was announced with the proclamation of the "self-evident truth" that "all men are created equal," we can be sure that claims for a fuller and broader meaning of equality before the law will be pressed. Based on the record before the Senate, even including the new perspective provided by Judge Bork's own testimony, this nominee's conception of the equal protection clause is not broad and dynamic enough to reassure me that as a Justice of the Supreme Court, he will respond to these claims in the way the American people have a right to expect.

Our nation, in Abraham Lincoln's words, is not only "decided to the proposition that all men are created equal"; it was also "conceived in liberty." The ideal of liberty as embodied in our Constitution provides the third theme for the Judiciary Committee's examination of Judge Bork's judicial philosophy.

As with freedom and equality, our Constitution speaks of liberty in the most general terms. The Fifth Amendment states that "no person shall . . . be deprived of . . . liberty . . . without due process of law." The Fourteenth Amendment directs a similar command to the States. As the Court applied this general language to a series of cases in our country's history it defined the meaning of the liberty our constitutional system was designed to protect.

These cases give lift to a powerful American ideal that is more implicit than explicit in the words of the Constitution. Perhaps the Ninth Amendment comes closest to expressing it: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But liberty is not just a group of rights; it is also an essential set of limitations on the power of government.

The Supreme Court's delineation of constitutional liberty may be found in an important series of 20th Century cases. These precedents recognize that in some aspects of the lives of individuals and families, the government has no legitimate power to intrude.³³ Government is fenced out of those parts of our lives. We sometimes refer to the doctrine these cases establish as the right to privacy, but Justice Louis Brandeis' famous phrase more accurately describes constitutional liberty: "the right to be let alone."³⁴

These precedents do not draw the boundaries of our liberty with crystalline clarity. But they do identify points within the sphere of private and family decisionmaking where government must "let us alone."

It is fitting that, in a debate which leads to a referendum on the future of our constitutional ideals, most of the points of liberty identified by these precedents concern our children. How shall we educate them?³⁵ What shall we teach them about our culture and

³³ *E.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁴ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., Dissenting).

³⁵ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

our heritage.³⁶ Shall we bring that heritage to life by having children live with their grandparents?³⁷ Shall we marry and have children at all, and if so, when?³⁸ Under our system, these are all decisions that, within certain limits, we are at liberty to make as we choose, without the unwanted intrusion of government.

These are also precisely the precedents which Judge Bork has most incisively and consistently criticized, for the very reason that they are not specifically rooted in the literal text of the Constitution. He has called these precedents "unprincipled,"³⁹ "utterly specious,"⁴⁰ "intellectually empty,"⁴¹ and even "unconstitutional."⁴² This last criticism is part of Judge Bork's assertion that "nobody believes the Constitution allows, much less demands" some of these decisions,⁴³ which, in his words, "could not have been reached by interpretation of the Constitution."⁴⁴

These statements from Judge Bork's speeches and articles, both before and after he became a judge, are not contradicted by his actions on the bench. In those rare cases in which constitutional privacy issues came before him, he has continued to criticize these precedents.⁴⁵ This is not improper, so long as he carried out his responsibility as a lower court judge to apply the precedents faithfully. While the testimony on this issue conflicts, I believe he has fulfilled that obligation as a U.S. Circuit Judge.

But Judge Bork's nomination to the Supreme Court requires the Senate to examine Judge Bork's philosophy of constitutional liberty in a different light. As a lower court judge, he is bound by precedent, even precedent he considers fundamentally illegitimate. As a Justice of the Supreme Court, he will have the power, and in some instances even the duty, to vote to overturn precedent that he believes the Constitution does not "allow, much less demand."

Thus, two issues of liberty are important in this nomination. First, what is Judge Bork's philosophy on this question? Have his views changed from those he has expressed with such consistency and forcefulness over the past decade and a half? Second, what does he think of the power of precedent for the Supreme Court? What consequences does his philosophy hold for the future of constitutional liberty?

The record on the first question is clear. Judge Bork's views on the role of the Supreme Court in defining constitutional liberty have not changed in any substantial degree.

His testimony on this subject did clear away some underbrush that might obscure the main issue. He emphasized the distinction between his personal views and his conception of the commands of the Constitution. For example, the Connecticut law which the Supreme Court struck down in the 1965 case of *Griswold v. Connecticut*

³⁶ See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁷ See *Moore v. East Cleveland*, 431 U.S. 494 (1977).

³⁸ See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 107 S.Ct. 2254 (1987).

³⁹ *Indiana LJ*, at 4.

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 11.

⁴² Bork Testimony on Human Life Bill, Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. 310 (1981).

⁴³ *Id.* at 315.

⁴⁴ Bork Speech at Catholic University, 3/31/82, at 4.

⁴⁵ *E.g., Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

cut made it a crime for a married couple to use contraceptives. Judge Bork reiterated his conviction that this was a "silly" or a "nutty" law⁴⁶; but as he told me in response to a question at the hearing, "Merely the fact that it is a dumb law gives the Court no additional power because there is no statement in the Constitution that no state shall make a dumb law."⁴⁷

Judge Bork also emphasized that he was criticizing *Griswold* and other precedents for the reasoning employed by the courts, and not necessarily for the results reached. Perhaps the same result could be reached by another route. As he told the Committee with respect to *Griswold*, "I have never tried to find a rationale and I have not been offered one. Maybe somebody would offer me one."⁴⁸

Neither of these points reflect any significant change in Judge Bork's judicial philosophy. I never thought that Judge Bork's personal views on the statute struck down in *Griswold*, or indeed any similar policy matter, have any relevance to the merits of his nomination. His personal views on contraception are immaterial.

And the distinction between rationale and result is not particularly meaningful. The result of *Griswold* is history, and the flow of history has left that particular "nutty" statute stranded on a shoal of the past. What is most important for the future is the rationale of the decision, and how it will be applied, expanded, or rejected when the next case, and the next and the next, inevitably come along.

Judge Bork still challenges the legitimacy of *Griswold* and all the other cases defining a constitutional right of privacy. He testified, "If I decide that I am going to protect liberty . . . I have to define it without guidance from the Constitution—what liberties people ought to have and what liberties they ought not to have . . . I became convinced that it was an utterly subjective enterprise . . . I do not want judges, including me, going around, saying, 'You have this liberty, you do not have that liberty. . . .'"⁴⁹

Judge Bork continues to maintain, with fervor and force, that the Supreme Court cannot give real content to the general concept of constitutional liberty, as contrasted with the specific guarantees of the Bill of Rights and other constitutional provisions. Judge Bork continues to defend an isolated position.

One knowledgeable witness before the Judiciary Committee asserted that "not one of the 105 past and present Justices of the Supreme Court has ever taken a view as consistently radical as Judge Bork's on the concept of 'liberty'—or the lack of it—underlying the Constitution."⁵⁰ Whether or not that is so, it is certainly true that in modern times the Justices have virtually without exception agreed that "liberty" is something more than observance of the specific limitations on government that are literally spelled out in the Bill of Rights. They arrived at this conclusion by a variety of routes, and applied it differently in different cases. But I do not know of any who would accept the proposition that the liberty of

⁴⁶ Transcript, 9/16/87, at 49, reiterating Bork Interview for Newsweek, 9/14/87, at 36.

⁴⁷ Transcript, 9/18/87, at 293.

⁴⁸ Transcript, 9/15/87, at 136.

⁴⁹ Transcript, 9/18/87, at 227-28.

⁵⁰ Statement of Laurence Tribe, 9/22/87, at 14.

Americans and their families goes only as far as the words of the first eight amendments to the Constitution, and no further. Indeed, I think the American people would find that narrow concept of their liberty profoundly disturbing.

What Judge Bork derides as an "utterly subjective enterprise" is what most of us would call the process of wise judgment. The role of a Justice of the Supreme Court in these cases is to draw lines, to shape contours, and then to tell government, "This far you may go, but no further, into the private lives of the citizenry." To draw those lines requires a keen intellect, a deep understanding of history, a sense of justice, and that undefinable mixture of prudence and boldness we call good judgment. The issue for the future, and hence for this nomination, is not whether Judge Bork has those qualities, but whether he is philosophically committed to exercising them on behalf of the ideal of liberty so central to our constitutional system.

The question, then, is how a Justice Bork would use this rich history of the ongoing development of our constitutional liberties. Would he approach it as a conservative: conserve what is best in the precedents and build upon it to decide future clashes between the demands of the government and the rights of the individual? Or would he take the activist approach of seeking to eradicate from our jurisprudence this chain of decisions that he still believes are profoundly misguided?

These are not questions to which Judge Bork's prior record gives us a definitive answer. After all, he has never before had any of the power—and will not unless the Senate confirms him—either to conserve or to reject the constitutional precedents of the Supreme Court. And the testimony of the nominee before the Judiciary Committee does not provide the definitive answer.

In my last opportunity to question Judge Bork at the hearings, I discussed with him this question of the power of precedent. I noted that earlier in the hearing he gave some examples of constitutional doctrines that were firmly embedded in our law. Judge Bork said then that regardless of whether these decisions were right or wrong, they "are now part of our law, and whatever theoretical challenges might be levelled at them, it is simply too late for any judge to try to tear it up, too late for a judge to overrule them."⁵¹

Judge Bork's list of these firmly settled doctrines—of precedents he would respect even if he disagreed with them—was short but significant. It included the expansive interpretation of the federal government's power to regulate interstate commerce. It included the legal tender cases, authorizing the printing of paper money. It included the expansion of the equal protection clause to cover gender discrimination. It even included the free speech precedents culminating in *Brandenburg v. Ohio*, which until the hearing he had never publicly accepted as settled law.⁵²

I then asked Judge Bork about the most salient cases involving the constitutional liberty of the American people: "the cases based on a constitutional right to privacy in matters relating to procreation, child rearing and the like." I asked him whether he would in-

⁵¹ Transcript, 9/18/87, at 46.

⁵² *Id.* at 289-90.

clude these decisions in his list of precedents that, right or wrong, were so firmly embedded in our law, and in the way we as Americans think about our rights, that "it is too late for the Supreme Court to tear them up."

Judge Bork replied as follows: "Senator, I have, I think, rather consistently testified that I am not going to answer that question because that is a highly controversial matter."⁵³ He continued that if a right to privacy could not be more firmly rooted in the Constitution, he would have to consider "whether this is the kind of case that should be overruled. And I have listed the factors that one would consider in deciding whether a case should be overruled. And I cannot go any further than that."⁵⁴

I do not criticize Judge Bork's reticence in answering my question. The purpose of a confirmation hearing for a Supreme Court Justice is not to extract commitments, but to exercise judgment about what the nominee is likely to do or not do if confirmed.

But Judge Bork's response does create a distinction. He already gave something resembling a commitment in response to another question. He said it was "too late to overrule" either the leading free speech cases or the cases addressing sex discrimination under the equal protection clause, even though he had consistently criticized those doctrines for years prior to the hearing. For Judge Bork, the cases defining a constitutional right to privacy and—even today—different.

On the issue of liberty, then, as contrasted with the questions of freedom and equality, Judge Bork did not accept the precedents. Nor did he assure us that he would reach the same result by a different route. Evidently, he continues to believe that by identifying a constitutional right to marital and family privacy the Supreme Court is not only taking the wrong path, but wandering off the path entirely, far from the signposts that can be read in the words of our Constitution.

This is what we know about Judge Bork's past views and his present thinking on the issue of liberty. But once again, our focus must be on the future.

The task of defining our liberties—of deciding where government must stay its hand, and the individual be left free to make his or her own wise or foolish choices—is one of the most difficult tasks of interpreting the Constitution. History tells us that the decisions that the Supreme Court makes in the name of liberty are not always wise ones. Even today, there is much that any thoughtful American can disagree with in this line of precedent. But if the Supreme Court were to shirk the duty of making these decisions, of drawing these lines to define the spheres of government power and individual rights, the results would be chilling—chilling for the American people to contemplate.

Government power and individual rights will continue to collide as we approach the new century. Technology will give government an ever greater capacity to intrude into our homes, our families even our bedrooms. And if we doubt whether government will ever

⁵³ *Id.* at 291

⁵⁴ *Id.*

be tempted to realize this potential for intrusion, we ignore the implications of today's headlines and the lessons of history.

When a majority of the community, acting through its elected representatives, oversteps its legitimate bounds, the results, in retrospect, sometimes seem amusing, trivial, even "nutty." But that does not mean that the majority will never repeat such mistakes. To the contrary, history teaches us that under the pressure of public turmoil or panic, the majority will in the future, as it has in the past, sometimes seek to channel the force of government into collision with the rights of the individual. It may do so with the best of motives, with the most plausible of reasons, and with overwhelming popular support. Where then can the individual turn for protection of a fundamental liberty, the right "to be let alone"?

History gives us the answer. The individual will seek to vindicate his liberty in the same forum to which black Americans turned when the majority refused to hear that separate is inherently unequal. It is the same forum to which disenfranchised voters turned when legislative majorities refused to heed the call for "one person, one vote." The future defenders of liberty will turn to the courts, the institution that must stand, in James Madison's phrase, as "an impenetrable bulwark" to protect our liberties against a powerful government with majority support.

If the government action violates a specific guarantee of the Bill of Rights, the courts have a duty to put and end to it. But if the right involved is not specifically listed in the Constitution, but instead emerges from our shared ideals of liberty, then it is equally important that the courts vindicate it, not, in the words of the Ninth Amendment, "deny or disparage" it.

This is the ideal that the American people hold of the Supreme Court as the guardian, not only of their specifically enumerated freedoms, but also of the liberties that they have never surrendered to the government. But as I understand the record before the Senate, this is not the concept of constitutional liberty that Judge Bork holds.

We cannot know the specific challenges to liberty that will confront us and our children in the years ahead. But we can foresee that new and complex developments in our society—genetic engineering and other new technologies, threats of terrorism, epidemics of disease and panic, the name only a few—will spawn difficult and important controversies. Those cases will test, more forcefully than ever before, our commitment to limited government and to the "right to be let alone." That commitment is embodied in the specific words of the Constitution. But it can also be found in the tradition of a Supreme Court that accepts the responsibility to give real meaning to the ideal of liberty.

Judge Bork has often said that American law lacks theory; it only has a tradition.⁵⁵ That tradition may be uneven and inconsistent. Its structure may be blurred, not sharply drawn. But if the Supreme Court is faithful to that tradition, it can continue to be a powerful safeguard against the threats to liberty that may confront the court in the decades ahead. The Justices of the Supreme Court

⁵⁵ Indiana LJ, at 1; Bork, "Tradition and Morality in Constitutional Law," at 10 (AEI 1984); Bork Speech at West Point, 4/9/85, at 12.

must be true to that tradition. I am not confident that Judge Bork can meet that test.

The extensive hearings on the nomination of Judge Bork examined in depth many other issues besides the three discussed here. The testimony we heard from dozens of accomplished public servants, legal scholars, historians, and other citizens was useful and thought-provoking.

I gave careful consideration to the testimony of former President Ford, former Chief Justice Burger, and former counsel to the President Lloyd Cutler. The essence of their testimony is that Judge Bork's philosophy poses no realistic threat to our constitutional ideals of freedom, equality and liberty. These distinguished Americans, and other supporters of this nomination, argue that the concept of the Constitution that this nominee would bring to the Supreme Court will strengthen its capacity to apply these values to the unknown cases and controversies of the future.

The witnesses on either side of this controversy may speak the language of certainty. But the real issue before us is one of probabilities and of risk. Many thoughtful and distinguished Americans have shared their versions of the future with us. But our duty is not to align with witnesses, however prestigious, who vouch for or against the nominee. Each Senator brings to this nomination what we know of Judge Bork's past record and recent testimony, but the question which we all seek to answer concerns the future. The task is for each Senator to make an independent judgement about how the confirmation of Judge Bork is likely to shape the rights, the hopes and the dreams of today's Americans, and of our children who will live most of their lives in the 21st Century.

As we vote on this nomination, we must respond to the recommendation of the President. But we must answer, not to him, but to the people.

We must answer to the author, the artist, the orator, who draw creative sustenance from freedom of speech.

We must answer to the women who ask nothing more than the chance to compete equally in contributing to the wealth and well-being of our society.

We must answer to parents of every race and creed who dream of a better life for their children.

We must answer to the families who willingly respond to the just claims of government, but who understand that they and their children are not creatures of the state, and that some decisions are too intimate and important to leave to government.

We must answer to every American who recognizes that the majority may rule, but the majority is not always right.

I have made my judgment, and I am prepared to be accountable to my fellow Vermonters for it. I conclude that the confirmation of Judge Bork to the Supreme Court poses too great a risk for the future of the ideals—freedom, equality, and liberty—that “we the people” have embodied in our Constitution. This judgement is a prediction, not a fact, and if Judge Bork is confirmed I may be proven wrong. But after studying the massive record before the Committee, I believe that my judgment is correct.

Accordingly, I recommend against the confirmation of Judge Bork.

ADDITIONAL VIEWS OF SENATOR HEFLIN

While I am in agreement with most of the language in the Committee Report on the nomination of Robert Heron Bork, I believe that the statement I made on October 6, 1987, prior to the committee vote is a more accurate reflection of my views on this nomination. Thus, I submit my statement as additional concurring views to the majority report.

In my opening statement some three weeks ago, I labeled the Supreme Court as the actual "People's Court." On an every day basis, the Supreme Court of the United States deals with real people, their basic human rights, and liberties.

It determines the rights of individuals—to be secure in their homes and thoroughfares—to own property—to vote—to be left alone in normal intimate settings—to the due process of law and the equal application of laws. It further determines the rights of people as a whole to law and order.

I outlined in my opening remarks the arguments, pro and con, about the nominee. I stated, among other things:

We are told by some that Judge Bork will strictly construe the Constitution—eschewing activism, and interpreting the law, not substituting his personal opinion for what the law should be.

We are told by others that Judge Bork is an extremist, an ideologue of the first order, a legal zealot who will use his position on the Court to advance a far right radical judicial agenda.

If Judge Bork is a true conservative who guards against activism, our now fundamental precepts of a fair and just society, which include people's rights, will be protected. On the other hand, if he is an extremist, whose concept of the Constitution calls for the reversal of decisions dealing with human rights and individual liberties, then people's rights will be threatened.

As the hearings have proceeded, I have endeavored to find an answer. Frankly, I would favor a conservative appointment on the Court. I have supported the three (3) appointments that President Reagan has made on the Supreme Court. In fact, I have supported all but two (2) of the 325 nominations to the federal bench made by President Reagan, because I felt they would, in most instances, become good conservative and impartial jurists. But, on the other hand, I don't want an extremist on the United States Supreme Court.

There is little question that Judge Bork is a jurist of outstanding intellect and qualifications. He is indeed an erudite scholar. His credentials and experience are unsurpassed. However, whether he is an extremist is a more difficult question to answer.

In order to determine the issue of extremism, these hearings have focused on the writings, opinions, and statements of Judge Bork as they relate to people's rights.

Judge Bork's early writings in law reviews, law journals, political periodicals, and other publications reveal extremism on a number of issues. However, he has on occasions renounced many of these early judicial extremist beliefs. His oral statements in these confirmation hearings indicate that he has changed many of these extremist views and become a conservative in the thalweg of judicial movement. Yet, many have questioned these oral renouncements as merely a confirmation conversion and lacking permanent sincerity.

I am also troubled by the absence of writings or prepared speeches which recite a change in his earlier views and the reasons for such change.

My concerns were not reduced by speeches made in the year 1987 before he was nominated. In a speech in January of this year to the Federalist Society, Judge Bork stated:

Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy.

I have read and reread his speech to the Philadelphia Society which some have labeled "Bork's Wave Theory of Law Reform" made in April of 1987, approximately three months before he was nominated. Parts of the speech reflect conservative thought, but portions of that speech read like a speech of an extremist with an agenda. While it was an after-dinner speech, nevertheless, it was a carefully prepared fifteen-page address that can leave a person with the impression that he is advocating a movement to sweep the debris of nonoriginalist decisions of the Supreme Court off the books and out to sea. On the other hand, it is subject to a milder interpretation.

The history of Judge Bork's life and life-style indicates a fondness for the unusual, the unconventional, and the strange. It has been said that he is either an evolving individual with an insatiable intellectual curiosity for the unique, the unknown, the different, and the strange or, on the other hand, that he is an extremist with a propensity toward radicalism. His history as a young man reveals that he was first an avowed socialist—that he gave considerable attention to becoming a marxist—then he returned to socialism—after which he moved toward libertarianism. As he grew older, he became next a "New Deal liberal"—and then evolved to a strict constructionist—and more recently he has been a self-proclaimed "originalist." It now appears from his oral declarations at these hearings that he has turned another corner and is moving back towards the center.

I am in a state of quandry as to whether this nominee would be a conservative justice who would safeguard the living Constitution and prevent judicial activism or whether, on the other hand, he would be an extremist who would use his position on the Court to Advance a far-right, radical, judicial agenda.

The question is difficult. Frankly, I am not sure that I have the answer. I am reminded of an old saying, "when in doubt, don't." I see a great deal of wisdom to this warning. A life-time position on the Supreme Court is too important to risk to a person who has continued to exhibit—and may still possess—a proclivity for extremism in spite of confirmation protestations.

Because of my doubts at this time and at this posture of the confirmation process, I must vote no.

ADDITIONAL VIEWS OF SENATOR SPECTER

I am writing separately to express my reasons for opposing this nomination.

I shall vote against Judge Bork on confirmation to the U.S. Supreme Court because I believe there is substantial doubt as to how he would apply fundamental principles of constitutional law. This is a difficult vote since I will be opposing my President, my party and a man of powerful intellect whom I respect and like. I have spent hours discussing my concerns with Judge Bork both publicly at the hearings and privately in my office with the last meeting for more than an hour yesterday afternoon.

This vote is especially hard since I know I will be disappointing many constituents who feel so strongly in favor of Judge Bork although there are about as many with equally strong feelings in opposition. At the end, politics and personalities must give way, for me, to my own judgment on the history and the future of the Constitution.

Constitutional separation of power is at its apex when the President nominates and the Senate consents or not for Supreme Court appointees who have the final word. The Constitution mandates that a senator's judgment be separate and independent.

My judgment on Judge Bork is based on the totality of his record with emphasis on how he would be likely to apply traditional constitutional principles on equal protection of the law and freedom of speech.

I am troubled by his writings that unless there is adherence to original intent, there is no judicial legitimacy; and without such legitimacy, there can be no judicial review. This approach could jeopardize the most fundamental principle of U.S. Constitutional law—the supremacy of judicial review—when Judge Bork concedes original intent is so hard to find and major public figures contend that the Supreme Court does not have the last word on the Constitution.

I am further concerned by his insistence on Madisonian majoritarianism in the absence of an explicit constitutional right to limit legislative action. Conservative justices have traditionally protected individual and minority rights without a specifically enumerated right or proof of original intent where there are fundamental values rooted in the tradition of our people.

Thirty-three years after the fact, there is still no acceptable rationale for the desegregation of the schools in the District of Columbia according to Judge Bork's doctrine of original intent. It is not only that the majority in a democracy can take care of itself while individuals and minorities often cannot, but rather that our history has demonstrated the majority benefits when equality enables minorities to become a part of the ever-expanding majority.

These conceptual concerns might be brushed aside if it were not for his repeated and recent rejection of fundamental constitutional doctrines. Over the years, Judge Bork has insisted that equal protection applies only to race as originally intended by the Framers. As recently as one month before his nomination, he said equal protection should have been kept to things like race and ethnicity. His view of the law is at sharp variance with more than a century of Supreme Court decisions which have applied equal protection to women, aliens, illegitimates, indigents and others.

For the first time at his confirmation hearings, Judge Bork said he would apply equal protection broadly in accordance with the Court's settled doctrine under Justice Steven's reasonable basis standard. Without commenting on the various technical levels of scrutiny, I have substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless specified or are within original intent.

Similarly, Judge Bork had, prior to his hearings, consistently rejected the "clear and present danger" test for freedom of speech even though a unanimous Supreme Court had accepted it as an ingrained American value for years. Justice Holmes' famous dictum that "time has upset many fighting faiths," expressed the core American value to listen to others and permit the best ideas to triumph in the marketplace of free speech, short of a clear and present danger of imminent violence.

At the hearings, I asked Judge Bork about his position that Justice Holmes had a "fundamentally wrong interpretation of the First Amendment." After extended discussion, Judge Bork said for the first time he would accept the doctrine as settled and apply it although he still disagreed with the underlying philosophy. I have substantial doubt about Judge Bork's application of that standard to future cases involving different fact situations where he retains his deep-seated philosophical objections.

In raising these doubts about Judge Bork's application of settled law on equal protection and freedom of speech, it is not a matter of questioning his credibility or integrity, which I unhesitatingly accept, or his sincerity in insisting that he will not be disgraced in history by acting contrary to his sworn testimony, but rather the doubts persist as to his judicial disposition in applying principles of law which he has so long decried.

These concerns and doubts lead me, albeit with great reluctance, to vote against Judge Bork.

OCTOBER 1, 1987.

MINORITY VIEWS

INTRODUCTION

The hearings on Judge Bork were some of the most far-ranging, probing, and exhaustive ever undertaken by the Committee. The nominee was the most open and forthright to appear before the Committee. The hearings focused on several basic areas: the qualifications of the nominee; the nominee's view of the Constitution; the nominee's view of the role of the judiciary; the nominee's views on specific issues such as civil rights, the right of privacy; First Amendment rights, antitrust issues, and criminal law issues; his view of precedents; and his role in dismissing Watergate special prosecutor Archibald Cox. In each instance, Judge Bork's record and thoughtful responses place him well within the conservative mainstream of American jurisprudence.

As for qualifications, no one seriously questions that Judge Bork is eminently qualified by virtue of his ability, integrity and experience. Therefore, opponents attacked Judge Bork in other areas, such as his view of the judiciary's role in our democracy. However, Judge Bork's belief that judges should merely interpret, and not make, law is clearly the accepted view of most Americans. Additionally, Judge Bork's understanding of Constitutional principles of limited federal power is both intellectually honest and comports with historical and contemporary analysis of this great document.

The major criticisms leveled at Judge Bork are the result of misunderstandings by his critics: First, a misunderstanding of the difference between the role of a professor and that of a judge, and second, a misunderstanding of Judge Bork's position on substantive issues. Despite sloganeering and misrepresentations to the contrary, Judge Bork is well within the judicial mainstream on such issues as individual liberties, civil rights, the First Amendment, criminal law issues, antitrust matters, and the value of precedent.

Along with a vast number of judges and legal scholars, Judge Bork disapproves of a Court-created generalized "right of privacy." What this means is that Judge Bork does not believe that judges are free, at their whims, to create new "rights." His view that Constitutional rights must have a basis in the Constitution is being portrayed by some as extremism, as an unpredictable philosophy. In reality, Judge Bork's comprehensive theory of jurisprudence is firmly based in our judicial history, and is at least as predictable as any other judicial philosophy, and certainly more so than one which strains to "create" new rights.

Despite a unanimous Senate confirmation to serve as Court of Appeals Judge since Watergate, some opponents tried to rekindle

controversy over Judge Bork's role in dismissing Archibald Cox. Testimony by Former Attorney General Elliott Richardson should now put this issue to rest forever. Additionally, egregious misrepresentations of specific decisions or comments by Judge Bork have been promoted and repeated by his opponents. It takes very little to create an incorrect perception, but tedious work to set the record straight; that explains the lengthy discussions which follows in these views.

Judge Bork has proved to be a forceful intellect, and a man of unquestioned integrity. He is the victim of the misunderstandings of his critics, who confused the roles of Robert Bork as a legal commentator and Robert Bork, the Judge; critics who do not truly understand his substantive positions, and who launched an aggressive public relations campaign based on what they thought to be Judge Bork's views. In reality, Judge Bork has excelled at all experiences an attorney can have: as private practitioner, as a law professor, as a government lawyer, and as a judge. An objective review of this nominee and his record must lead one to concur with the assessment of Chief Justice Burger who said that in the past 50 years no nominee to the Supreme Court has "had better qualifications."

A. QUALIFICATIONS

Judge Robert Heron Bork is among the most qualified nominees to the Supreme Court in recent history. Former Chief Justice Warren Burger said Judge Bork is one of the best qualified candidates for the Supreme Court in 50 years. Robert Bork was born on March 1, 1927 in Pittsburgh, Pennsylvania and attended elementary and high school there. He attended the University of Pittsburgh for a short time in 1944 and volunteered to serve in the United States Marine Corps in 1945 and served until 1946. He reentered the Marine Corps in 1950, serving until 1952, when he was honorably discharged.

In between his tours of duty, he received a Bachelor of Arts degree from the University of Chicago in 1948 and he was elected to Phi Beta Kappa. Subsequently he began his studies at the University of Chicago Law School. He received his J.D. in 1953, having served as the managing editor of the Law Review. He was also elected to Order of the Coif, a national honor society. In 1953, he was employed as a research associate at the Law and Economics Project of the University of Chicago Law School where he worked with Professor Aaron Director. In 1954 he joined the New York law firm of Wilkie, Owen, Farr, Gallagher & Walton. In 1955 he became an associate at Kirkland, Ellis, Hodson, Chaffetz & Masters in Chicago, Illinois, where he practiced law until 1962.

Shortly after becoming a partner at that firm, he left to teach at Yale Law School and was named a Professor in 1965. In 1973, he was nominated to serve as Solicitor General of the United States in the Department of Justice and was unanimously confirmed by the Senate. He rendered distinguished service in that position until 1977, when he returned to Yale Law School, where he occupied two endowed chairs: first was that of Chancellor Kent Professor of Law from 1977 through 1979, and then that of Alexander Bickel Professor of Public Law from 1979 to 1981.

Judge Bork returned to Washington, D.C. and Kirkland & Ellis in 1981, where he was a practicing partner for 1 year. In 1982 President Reagan nominated him to be a Judge on the U.S. Court of Appeals for the District of Columbia Circuit. He was confirmed unanimously by the full Senate and has served with distinction since that time.

As former President Gerald R. Ford stated during his introduction of Judge Bork,

There are four kinds of occupations that a lawyer can have: private practitioner, law professor, government lawyer, and judge. Robert Bork has distinguished himself in not one, but in all four endeavors. A renowned Federal Appeals Court Judge, former Solicitor General of the

United States, professor of law at Yale University, and twice a partner in one of the Nation's leading law firms.

Judge Robert Bork is uniquely qualified to sit on the United States Supreme Court.

There is virtual unanimity among the members of the Committee and all witnesses that Judge Bork excelled with respect to all the criteria normally considered in evaluating a nominee to the Supreme Court: judicial integrity, judicial temperament, and judicial competence.¹ For example, former Secretary of Transportation William Coleman, who testified against Judge Bork's nomination, stated:

Mr. Coleman: As a judge on that court [of Appeals], his opinions are good opinions. . . .

Senator Hatch: Okay. Now in 1981, you also agreed that Judge Bork met the highest standards of professional integrity, is that correct?

Mr. Coleman: Yes.

Senator Hatch: And do you know of any event since 1981 which would cast doubt on Judge Bork's highest standards of professional integrity?

Mr. Coleman: I know of none, and more important, I heard the Chairman of this Committee, on Saturday he said that he had looked through the FBI report, and there was nothing in which would in any way cast doubt on his integrity.

Later, Mr. Coleman remarked, "I have no doubt about his professional competence," and "I have no question about his judicial temperament."

Congresswoman Barbara Jordan said, "I concede Judge Bork's scholarship and intellect and its quality, and there is no need for us to debate that."

Professor Burke Marshall of Yale Law School said: "I am sure that Judge Bork is an intelligent and skilled lawyer, and he is an intelligent and skilled judge so far as I know."

Former Attorney General Nicholas deB. Katzenbach said: "[Judge Bork] is learned in the profession, far more learned than I, perhaps even more learned than some Members of this Committee." He concluded by saying, "I do respect Judge Bork enormously, and I want that made clear."

Professor Laurence Tribe of Harvard Law School said: "I have very high regard for Judge Bork's intellect, and I have no reason to doubt his integrity." Professor Tribe also had the following colloquy with Senator Simpson:

Senator Simpson: . . . Five and a half years of writing opinions on that Court and not one person yet has come in and said that any of those opinions are out of the mainstream. Is not that fascinating? Is not that fascinating? Not one.

¹ The Evaluation Criteria of the American Bar Association's Standing Committee on the Federal Judiciary states: "The Committee's evaluation of the prospective nominees to these courts is directed primarily to professional qualifications, that is competence, integrity and judicial temperament."

Mr. Tribe: I do not think it is—with all respect, to be honest—I do not think it is that fascinating, because I have never doubted, nor has anyone else, Judge Bork's really fine intellect and his capacity to write fine opinions that will not be reversed by the Supreme Court.

In response to questioning about the importance of Judge Bork's record of never being reversed by the Supreme Court, Professor Tribe said:

These cases show that Judge Bork professionally is capable of writing a fine opinion on matters that relate to statutory interpretation . . . [O]n the whole, when they address matters of statutory interpretation, they are very well done. It would be unfair to Judge Bork to say that you could just pull them out of a bottle, and they they do not tell you anything about his intellect; they do.

Professor Cass Sunstein of Harvard admitted that “[i]f you use integrity and professional competence, I do not think it would be possible to have concerns about Judge Bork on those scores. He is a first-rate lawyer.”

Praise for Judge Bork's integrity, competence and intellect was shared by professors from both law schools and universities throughout the country. For example, the historian, Professor William Leuchtenberg of the University of North Carolina said: “Anyone who heard him in Philadelphia or who witness[ed] his performance here this past week would acknowledge that he is an able man who articulates his views with uncommon force; and to deny that would be unfair to the nominee.”

Professor Walter Dellinger of Duke Law School similarly praised Judge Bork, calling himself “an admirer of his.” Continuing, he said “I think he has added greatly to the intellectual discourse of our time by his challenges.”

Professor Philip Kurland of the University of Chicago Law School described Judge Bork as “a constitutional scholar of some distinction,” and said, “Had I been called here as a character witness, I should gladly tell you of his impeccable character.”

Professor Herma Hill Kay, speaking on behalf of her panel, added, “I'd just like to say that all of us as law professors always have to judge our graduates on their intellectual prowess, and I think on that measure as you've said, Judge Bork is clearly an intellectual strength.” And Dean Robert Pitofsky acknowledged that “it has been said that Judge Bork is a bold and brilliant scholar—which is true, in my opinion—and that he has been influential in molding the antitrust policy of the 1980's, which is also true.” Dean Lee Bollinger of the Michigan Law School remarked that Judge Bork “had displayed judicial competence that would justify an appointment to the Supreme Court.”

Practicing lawyers remarked about Judge Bork's outstanding qualifications. The President of the Association of the Bar of the City of New York, Robert Kaufman, said “the quality of Judge Bork's intellect and professional experience is not in dispute” Chesterfield Smith, past president of the American Bar Association, called Judge Bork “a brilliant jurist and lawyer,

and I respect his intellectual qualifications without reservation." Vilma Martinez of Los Angeles said,

Judge Bork, in his public statements and his writings, shows us a man who has a keen intellect and a knowledge of legal precedent and who attacks complex legal problems as the grand master attacks a chess board.

Even members of the Committee who are opposed to Judge Bork's confirmation acknowledged Judge Bork's fitness for the Supreme Court. For example, the Chairman told Judge Bork that "you are an honorable and decent man. There is nothing in your background that I have seen that in any way indicates that you are not, in terms of character, fit to serve on any court in any position in this country." He also called Judge Bork a "very bright man," who is "principled."

Senator Leahy noted that Judge Bork "is an intellectual, of the first order. He is a thinker; he is a philosopher." The Senator from Vermont later noted that he is a "distinguished legal philosopher."

Those who support this nomination are even stronger in their praise for Judge Bork. Those who testified on his behalf include former President Ford and former Chief Justice Burger. Seven former Attorneys General supported his nomination, six of them testifying before the Committee. Many highly respected academics, former colleagues and members of the bar testified on his behalf. In addition, Justice John Paul Stevens took this unusual step of publicly endorsing Judge Bork's elevation to the Supreme Court. There are many statements of praise for Judge Bork which reveal the truth of former Chief Justice Burger's statement—that Judge Bork is one of the best qualified candidates for the Supreme Court in 50 years.

The former Chief Justice added, "the man is thoroughly qualified on every count that I would consider if I were sitting as a Senator." Former Attorney General William French Smith called Judge Bork "a highly distinguished, fair-minded jurist and scholar of the highest professional integrity," with "all the earmarks of a great Supreme Court Justice," and said "there is no one better—qualified to sit on the Supreme Court." Former Attorney General Edward Levi, who has known Judge Bork for almost 40 years, said:

In my experience with him, I would say that Judge Bork is an able person of honor, kindness, and fairness, and I would say with practical wisdom, which he has shown as an outstanding Solicitor General, and an outstanding and eloquent judge, and for the sake of our country, I very much hope he will be confirmed.

Former Attorney General William P. Rogers said that "[c]ertainly, [he] could think of no nominees during [his] professional life who has been better qualified."

Judge Griffin Bell, former Attorney General during the Carter administration was among a number of prominent Democrats voicing support for Judge Bork, declaring that "if [he] were in the Senate [he] would vote for" Judge Bork. He said, "I like to see a man go to the Court who is going to be his own judge, be his own man, and I think that is the way it is going to turn out." Former

White House Counsel Lloyd Cutler testified on behalf of Judge Bork's nomination and gave his view that:

On the whole, I think he would come much closer as a sitting Justice if he is confirmed to a Justice like Justice Powell and Justice Stevens—and I remind you that that is precisely what Justice Stevens himself said, that “you will find in Judge Bork’s opinions a philosophy similar to that you will see in the opinions of Justice Stewart, Justice Powell, and some of the things that I . . . have written.”

Some of the respected academics testifying on his behalf had the following things to say about Judge Bork: “[T]he country will be better off with Robert Bork on the Supreme Court than without him because he is a person of surpassing intellectual distinction, because of his outstanding integrity and intellectual honesty, and because of his commitment to the rule of law.” (Professor Paul Bator, University of Chicago Law School.) “In my view no more than a score of persons has ever been nominated to the Supreme Court with such surpassing credentials.” (Professor Henry Monaghan, Columbia University School of Law); and, “He is a man of integrity who has adhered to the highest standards of the legal profession.” (Dean Dallin Oaks, Brigham Young University Law School.)

As noted above, these are but some of the comments attesting to Judge Bork’s qualifications by both supporters and opponents of his nomination. This selection should establish what is agreed upon by most: Judge Bork is qualified on all counts to be an Associate Justice on the Supreme Court.

B. ABA RATING

Judge Bork also received the highest rating for a Supreme Court Justice given by the American Bar Association’s (the “A.B.A.”) Standing Committee on Federal Judiciary (the “Committee”), “Well Qualified.” This rating, in the Committee’s words, “is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. The persons in this category must be among the best available for appointment for the Supreme Court.” As the statements set forth in the immediately-preceding section conclusively demonstrate, there should be no question that from the perspective of both his supporters and detractors, Judge Bork is fully deserving of the highest rating awarded by the American Bar Association.

Additionally, the A.B.A. also gave Judge Bork its highest rating in 1981, when it first evaluated Judge Bork for a position on the Court of Appeals for the District of Columbia Circuit. The A.B.A. then evaluated him as “Exceptionally Well Qualified,” a rating rarely accorded to nominees to the bench. To receive that rating, according to the A.B.A.:

the prospective nominee must stand at the top of the legal profession in the community involved and have outstanding legal ability, wide experience and the highest reputation for integrity and temperament. In addition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made impor-

tant community and professional contributions in order to meet the sparingly awarded "Exceptionally Well Qualified" evaluation.²

The determination that Judge Bork met these incredibly high standards and was deserving of the "Exceptionally Well Qualified" rating was made by an A.B.A. Committee based on an investigation conducted by former Secretary of Transportation William Coleman. But Secretary Coleman testified in these proceedings against Judge Bork's nomination despite his admission to Senator Hatch that he knew of no event since 1981 casting doubt on Judge Bork's highest standards of professional integrity.

Four members out of the fifteen on the A.B.A.'s Committee voted that Judge Bork was "Not Qualified." One voted not to oppose the nomination. These determinations were apparently made by members not strictly applying the stated A.B.A. criteria. As noted above, Judge Bork's critics and supporters are united in believing that he has the requisite judicial competence, integrity, and judicial temperament. The only explanation for these dissenting opinions can be that they ignored the requirement that their review be restricted "primarily to issues bearing on professional qualifications" and did that which the Committee states it does not do: "investigate the prospective nominee's political or ideological philosophy."³

C. JUDGE BORK'S TESTIMONY

The consensus of the Judiciary Committee was that Judge Bork's testimony was the most candid and comprehensive of any Supreme Court nominee ever to appear before the Committee. All acknowledged that Judge Bork fully and faithfully answered every question put to him by the Committee, stopping short only of addressing specific questions that are likely to be presented to Judge Bork on whichever court he sits.

The Chairman, for example, told Judge Bork that he had been "straight-forward" about his views on constitutional interpretation. He complimented Judge Bork for doing his "best to answer." (Hearings 9/19/87, at 120). He said: "You have not attempted to step back and say I can't speak to that issue." And he concluded Judge Bork's testimony by saying, "I find you to be a very bright man who has done his best to let us know what he thinks in a complicated set of principles and areas that we have discussed." (Id.)

Senator Spector also complimented Judge Bork for his testimony. He said:

² Although nominees for the District and Circuit Court appointments may earn, as did Judge Bork, the recommendation "Exceptionally Well Qualified," the rating of "Well Qualified" is the highest accorded to a Supreme Court nominee. See *Standing Committee on the Judiciary: What It Is and How It Works*, Sec. II.A (ABA 1983). The criteria by which those nominees are judged differs as well. During the hearings, Senator Simpson noted that the stated criteria for a District or Circuit Judge nominee include an examination of the nominee's political or ideological philosophy "to the extent that extreme views on such matters might bear on judicial temperament or integrity." No such exception is stated for Supreme Court nominees, giving rise to the inference—violated rather obviously in this case—that political ideology is not considered at all in considering a Supreme Court nominee's qualifications.

³ In contravention of its own rules, the A.B.A. Report at least four times discussed the opposition on political and ideological grounds of some of those interviewed to Judge Bork's nomination.

I want to compliment you for being so cooperative with this Committee. I believe that these hearings will set a new standard for Supreme Court nominees, which I think is really important. Last year, on the record, I expressed concern about the proceedings as to Justice Scalia not being able to get into issues.

[Y]ou have been very generous with your time, and more than the generosity with your time, you have been in responsiveness.

I think you have really dealt with the questions as best you can on very complex subjects, not to say that all the answers are going to please all of us, and I think you have had tough questions, perhaps questions at the belt—I don't think that they were below the belt—by the Committee. Depending on your perspective or someone's perspective there might be some differences to that, but you have tried to respond to the questions. (Hearings 9/19/87, at 69-70).

Senator Leahy agreed, noting that those who had watched the hearings had "seen a nominee responding forthrightly and willing in detail to the inquiries of members of this Committee, and I commend you for that." (Hearings 9/18/87, at 278).

Judge Bork testified in detail about his judicial philosophy, his views on the manner in which the Constitution should be interpreted, on *stare decisis*, on the First Amendment, the Equal Protection Clause of the 14th Amendment, privacy, rights and the separation of powers. He explained in detail his prior criticisms of cases such as *Shelley v. Kraemer*, *Katzenbach v. Morgan*, *Reynolds v. Sims*, *Harper v. Virginia Board of Elections*, *Griswold v. Connecticut*, *Roe v. Wade*, *Skinner v. Oklahoma*, *Brandenburg v. Ohio*, and *Cohen v. California*, among others. He explained that respected jurists and scholars—including some of the greatest jurists of this century such as Black, Stewart, and Harlan—had strongly criticized each of these cases. He spoke about his views on the Commerce Clause, the Commerce Clause cases, the Legal Tender cases, antitrust, and congressional standing. He addressed questions put to him about the War Powers Act, the Foreign Intelligence Surveillance Act, the Independent Special Prosecutor Act, and the constitutionality of the Pocket Veto, and others.

In an unprecedented manner, Judge Bork fully explained in detail his views on a broad array of complex and difficult legal questions. Judge Bork's candid and informative testimony revealed that he is both a thoughtful jurist and scholar of the highest order, one who combines a rich and probing intellect with an intimate knowledge of constitutional jurisprudence. Particularly in light of Judge Bork's universally acknowledged integrity, his candid and thorough answers to the searching questions posed should put to rest any issues or concerns that some may have had before he testified.

D. WHAT WAS LEFT UNSAID

Thus, by any historical standard for Supreme Court Justices, it is clear that Judge Bork is more than amply qualified to sit on the Supreme Court. Indeed, there was no serious question raised con-

cerning Judge Bork's performance in those areas most relevant as Solicitor General of the United States and his record as a Court of Appeals Judge for the District of Columbia Circuit. With little in Judge Bork's record of on-the-job performance to criticize, Judge Bork's opponents resort to scrutiny and censure of his writings as an academic and, what is worse, to distorting and mischaracterizing his record. In doing so, they ignore the truth.

They ignore his undisputed record of fairness and even-handedness as a judge. One indication of his impartiality is his record in labor cases. In 38 labor cases Judge Bork voted for the union nineteen times and for the employer nineteen times.

Judge Bork has a record as a strong advocate of the right to free speech. Judge Bork has written such important opinions as *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *Lebron v. Washington Metropolitan Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), *F.T.C. v. Brown & Williamson*, 778 F.2d 35 (D.C. Cir. 1985), and *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984). In *Ollman*, Judge Bork relied on the changing realities of libel litigation to conclude that it was necessary to have greater first amendment protections for the press in that context. In *Lebron*, Judge Bork held that an administrative agency had violated an artist's rights by refusing to let him display a poster extremely critical of President Reagan in space leased for advertisements on the inside of subways. In *Brown & Williamson*, Judge Bork demonstrated his concern about any form of censorship and vacated an injunction restricting a cigarette company's ability to engage in certain kinds of advertising without prior FTC approval, and remanded to the district court to enter a less restrictive injunction. And in *Reuber*, Judge Bork sought to protect an employee of a private firm who had spoken critically of the government, arguing that an employee ought to be able to sue his employer if the employer was an agent of the government.

Judge Bork has an excellent record in civil rights cases, he has consistently and forcefully defended the civil rights of the parties appearing before him. As a judge, he has ruled for the minority or female plaintiff in seven of eight cases involving substantive civil rights issues. This includes cases such as *Emory v. Secretary of the Navy*, 819 F.2d 291 (D.C. Cir. 1987), where Judge Bork reversed a district court's decision dismissing a claim of racial discrimination against the United States Navy. His record includes *Laffey v. Northwest Airlines*, 740 F.2d 1071 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1181 (1985), where Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its women employees. It includes *Palmer v. Schultz*, 815 F.2d 84 (D.C. Cir. 1987), where Judge Bork held in favor of women foreign service officers alleging discrimination by the State Department in assignment and promotion. It includes *Ososky v. Wick*, 704 F.2d 1264 (D.C. Cir. 1983), where Judge Bork voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system. It also includes *County Council of Sumter County, South Carolina v. United States*, 555 F.Supp. 694 (D.D.C. 1983), 696 F. Supp. 35 (D.D.C. 1984) (per curiam), where he held that the local county had failed to prove that its new voting system had "neither the purpose nor effect of denying or abridging the

right of black South Carolinians to vote." These decisions held (among other important rulings) that inferences of intentional discrimination can be made based solely on statistical evidence, that Title VII's statutory limitations should be liberally construed, and that female stewardesses may not be paid less than male pursers in the job that are only nominally different.

Judge Bork has an excellent record of collegiality and agreement with his colleagues on the D.C. Circuit, even those appointed by a Democratic President. For example, Judge Bork voted with Judges Ginsburg, Mikva, Edwards, Wald, and Wright, respectively, in 91, 82, 80, 76, and 75 percent of cases in which they sat together. Indeed, even those on the Committee opposing Judge Bork recognized the spuriousness of the statistics manufactured by a number of special interest groups and, commendably, made no effort to insert them into the record, or bring into the debate. This, if nothing else, should prove how arbitrary and misleading were these so-called statistical "studies."

Judge Bork has a perfect record of non-reversal by the Supreme Court. Not one of the more than 400 opinions Judge Bork authored or joined has ever been reversed. Some suggested that this was irrelevant because the Supreme Court had never reviewed a majority opinion he has written. Former Chief Justice Burger in response to question on this subject said " * * * if the question were addressed to one case, and the question was what is the meaning of the Court's denial of cert in one case, then it has very little meaning, because the Court does not explain why it denies review. But when you look at a whole block of cases over the 6 or 7 years that Judge Bork has been on the Bench, * * * then, it has real significance, that over that period of time and that number of cases, that nothing was found wrong or worthy of review; then, it has real meaning." First, that the Supreme Court has let every decision he has ever made stand as settled law, binding within its circuit, is highly significant. Professor Richard Stewart of Harvard Law School acknowledged this, calling Bork's record of non-reversal a "significant fact" because the "Supreme Court does reach out, especially the D.C. Circuit being a very important court in the Federal system, to take up cases that are important cases, where it thinks it is wrong[ly] decided." Second, the Supreme Court has agreed with positions Judge Bork articulated in dissent, either from a panel opinion or from a denial of rehearing en banc, six separate times. Finally, the Supreme Court has reviewed decisions he has joined, and always affirmed them, demonstrating conclusively that in those cases Judge Bork's understanding of the law was correct.

His overall excellence as a Federal judge is ignored by his opponents who argue that 90 percent of all cases are "non-ideological" and easy to decide, that Supreme Court precedent is controlling, and that this explains his perfect record. This argument, however, is based on a fundamental misunderstanding of the role of the appellate judge. Many cases afford judges ample opportunity for latitude and that there is in fact a great deal of discretion in deciding cases. If there were not, computers could mechanically apply settled law to facts.

Judge Bork's record as a Solicitor General was exemplary. He forcefully led the fight against discrimination in employment, in

education, in elections and in business. In 17 of 19 cases Solicitor General Bork's argument supported the civil rights plaintiff or minority interest. His cases include a large number of significant civil rights victories; including *Runyon v. McCrary*, 427 U.S. 160 (1976), which affirmed that Section 1981 applied to racially discriminatory private contracts; *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), which upheld race-conscious electoral redistricting to enhance minority voting strength; and *Lau v. Nichols*, 414 U.S. 563 (1974), which held that Title VI, and possibly the 14th Amendment, reached actions discriminatory in effect, though not in intent.

Judge Bork demonstrated exemplary sensitivity as a Solicitor General. For example, Stewart Smith, former Tax Assistant to the Solicitor General, who worked for Solicitor General Bork, told of Judge Bork's willingness to take the unusual step of confessing error to the Supreme Court. Mr. Smith had discovered that the Government's key witness had perjured himself to secure the conviction of a black man from Alabama on drug and income tax charges. Solicitor General Bork unhesitatingly followed Smith's recommendation. To those who contend that Solicitor General Bork was only doing the bidding of others, Mr. Smith said, "That is, with all due respect, errant nonsense. That is not the way the Solicitor General's Office behaved. It is not the way any chain of command behaved. I made the recommendation, but it was Robert Bork who ultimately made the decision, for which he can take credit or possibly blame." Former Deputy Solicitor General Jewell Lafontant testified that as the first black woman in her position, she had been excluded from many meetings, until she reported this to Solicitor General Bork, who quickly resolved the matter by directing that she be included. She also told of Solicitor General Bork's complete support for the Federal Women's Program.

Solicitor General Bork's record also belies the claim that he is devoted only and always to advancing the cause of executive power at the expense of Congress. As further detailed later in this report, he convinced the Ford Administration to end its use of the pocket veto except at the end of a congressional session. He also argued that Vice President Agnew should be indicted.

E. POLITICAL CONSIDERATION

In short, Judge Bork is unquestionably a man who possesses high intelligence, integrity, professional competence and judicial temperament; who has been endorsed by a former President, by a former Chief Justice, a sitting justice of the Supreme Court, seven former Attorneys General, two top legal officers in the Carter Administration and a multitude of eminent legal scholars of differing ideological perspectives.

Ordinarily, this should put an end to any debate about Judge Bork's fitness to serve on the Supreme Court. However, politics and philosophical consideration were emphasized during the consideration of this nomination.

The history of the Advice and Consent clause shows that the Framers envisioned Senate confirmation as a tool for weighing the qualifications, rather than ideology, of each candidate. The historical evidence reflects the Framers' expectations that the President

would exercise great discretion in choosing nominees, while limiting the Senate's role to rejecting nonmeritorious candidates. The recent confirmations of Chief Justice Rehnquist and Justice Scalia are illustrative. Although those nominations "spawned more ideological opposition than any other court nominees in recent history," according to Professor Harry Abraham, each was confirmed easily. The Senate's unanimous confirmation of Justice Scalia, whose political and jurisprudential views are similar to those of Judge Bork, reaffirms that the Justice's personal political beliefs were not thought an appropriate consideration.

This has been recognized by Senators from both parties.

Just a few years ago the following comments were made by Senators in connection with the confirmation of Justice O'Connor.

Senator BIDEN: "We are not attempting to determine whether or not the nominee agrees with all of us in each and every pressing social or legal issue of the day. Indeed, if that were the test, no one would ever pass by this Committee, much less the full Senate."

Senator KENNEDY: "It is offensive to suggest that a potential justice of the Supreme Court pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single issue interest group."

Senator METZENBAUM: "I come to this hearing with no preconceived notions. If I happen to disagree with you on any specific issues, it will in no way affect my judgement of your abilities to serve on the Court."

And, as Senator Biden noted in the confirmation hearings for Abner Mikva, "The real issue is your competence as a judge and not whether you voted right or wrongly on a particular issue * * * If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench."⁴

In our opinion, it is inappropriate to register opposition because one disagrees, on a policy level, with the particular results produced by sound judicial reasoning in narrow range of cases. The question is not whether a judge is making policy with which the policymaker's agree, but whether the judge has neutrally discerned and applied the policy choices made by the framers and legislators. In this regard there can be no doubt that Judge Bork is a principled and consistent jurist and scholar. Thus, the attacks on Judge Bork's judicial philosophy are and can be nothing more than a claim that he is disqualified from serving on the Supreme Court because he *interprets* the law, rather than makes it.

F. JUDICIAL PHILOSOPHY

The debate about Judge Bork is a debate about who should govern America. We must decide whether the most difficult, controversial, moral and social issues of our time will be decided by unelected judges without any constitutional warrant for doing so or by democratically-elected representatives of the people who are in-

⁴ Sen. Biden, Hearing on Nomination of Abner Mikva to D.C. Circuit at 394, 396.

vested by the Constitution with this responsibility. That is the fundamental question raised by this nomination controversy.

Judge Bork, continuing in the long tradition of eminent jurists from John Marshall to Hugo Black to the two most recent appointees to the Supreme Court, believes that judges may override the policy choices made by democratic bodies only if that choice conflicts with a right that can fairly be discerned from the text, history and structure of the Constitution. Where the Constitution is silent—and it is deliberately silent on some of the most fundamental issues—those choices are to be made by the political process. Judges cannot impose their own version of “goodness” on legislatures. If there is no right anywhere in the Constitution which forecloses challenged legislative action, there is no warrant for a judge to overturn the value preferences because it furthers some abstract notion of goodness on which the Constitution is silent.

A judge's personal opinion as to the wisdom of legislation is entitled to no more deference than any other person's; it is the Constitution that defines individual's liberties that cannot be usurped by the majority. That being the case, unless a judge can locate a right in that Constitution, then he has no right, no legitimate basis, for concluding that his personal preferences are superior to all others and may thus be imposed on American society. As Judge Bork has written:

The question non-interpretivism can never answer is what legitimate authority a judge possesses to rule society when he has no law to apply . . . what entitles a judge to tell an electorate that disagrees that they must be governed by that philosophy? To see how extraordinary the claims of the non-interpretivists are it is useful to reflect that, if a judge wrote a statute and used it to decide a case before him, we would all regard that as an egregious usurpation of power, even though, it being a statute, the legislature could repeal or modify it. If moral philosophy would not justify a judge-written statute, how can it justify a judge-written constitution . . . ?

Bork, *Foreword to G. McDowell, the Constitution and Contemporary Constitutional Theory* at VIII (1985). In other words, if courts use extra-constitutional principles to determine cases, if they strike down legislative or executive action based on their personal notions of the public good, they usurp powers not given to them by the Constitution. They transform our representative democracy into a judicial autocracy, and abandon the rule of law based on the consent of the governed for the rule of individuals based on the judge's subjective notions of what is best for society. For this reason, judges who enforce values not firmly grounded in the Constitution share in an activist mode of judicial review that cannot legitimately take place in our Madisonian, constitutional democracy.

To be sure, the Judiciary must be “activist” in that it zealously protects and furthers values that can actually be found in the Constitution and applies those values to conditions that the framers did not foresee. So there is nothing to the charge that faithfulness to the original meaning of the framers would somehow lead to dim-

inution of constitutional values or exclude from constitutional protection such modern developments as electronic surveillance or the broadcast media. Again, Judge Bork himself has made this point quite eloquently when he wrote:

The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. The judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs the provision of a sole, fair and reasonable meaning fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedom the framers specified are made effective in today's circumstances In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.

Ollman v. Evans, 750 F.2d at 995-96 (Bork, J., concurring).

However, the fact that a judge should give full scope to *constitutional* values in light of new threats to that value, cannot and does not mean that a judge is thereby free to somehow invent and impose *new* values wholly divorced from anything in the Constitution because he believes that these values are more "in tune" with the values shared by contemporary society. In the first place, it borders on the absurd to suggest that nine (or five) unelected, life-tenured judges are better able to discern and implement "consensus" values of a diverse, pluralistic society that are the elected, fixed-term representatives who have adopted the law being invalidated.

Most fundamentally, however, to engage in such judicial activism is to deprive, others of perhaps the most fundamental right secured to them in the Constitution: the right to self-government. Every time a court invents a new right, it correspondingly diminishes the area of democratic choice. While some may applaud this shrinking of democracy, because they are unable to convince others of the wisdom of their policies, this result can only be attained at the expense of democracy and the freedom of the American people.

The current judicial controversy over the constitutionality of the death penalty illustrates this distinction, as well as the wisdom of Judge Bork's judicial philosophy. Some justices believe that convicted murderers have a constitutional "right" not to be subjected to capital punishment. Of course, the source of this "right" is not the Constitution. To the contrary, the Constitution expressly acknowledges the availability of capital punishment in at least four different places. As Judge Bork has stated, "By conventional methods of interpretation, it would be impossible to use the Constitution to prohibit that which the Constitution explicitly assumes to be lawful." Bork, *Judicial Review and Democracy*, Encyclopedia of American Constitution 1063 (1986).

Consequently, some Justices look *beyond* the Constitution to create such a right, asserting that the death penalty is inconsistent with "evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Bren-

nan, J., dissenting). This, of course, is the "enlightened" judicial philosophy to which Judge Bork's opponents insists he must subscribe. The capital punishment controversy perfectly illustrates why such a philosophy is illegitimate in a society dedicated to Government by the people and the accuracy of Judge Bork's observation that "a judge who looks outside the Constitution looks inside himself—and nowhere else." *A Conference on Judicial Reform*, June 14, 1982, at 5.

As with all invented rights, a right to be free of capital punishment is not derived from any evolving moral standard of society, but only the judges personal moral code. As with all invented rights, it does not enhance freedom but redistributes it. Inventing rights for murderers denies rights to victims and, more important, the right of society to fix appropriate punishment for violent crime.

Of course, inventing rights can be used to serve "conservative" as well as "liberal" political ends. For example, in the early part of this century, the Supreme Court used the vague language of the due process clause of the 14th Amendment to strike down a host of economic and social legislation, typified by Justice Peckham's conclusion in *Lochner v. New York*, 198 U.S. 45 (1905), that "[t]he general right [of an employer] to make a contract in relation to his business is part of the liberty of the individual protected by [the due process clause] of the 14th Amendment of the Federal Constitution." That case used the due process clause to invalidate a State law limiting the number of hours that a baker could work to 60 hours per week. So important did this precedent become that the period in which the Supreme Court used the due process clause to invalidate progressive social reform legislation became known as the *Lochner* era.

Numerous other cases also used "substantive due process," the doctrine currently relied on in the "privacy" case, to invalidate similar economic and social regulations. In *Coppage v. Kansas*, 236 U.S. 1 (1915), for example, the Supreme Court held that a State could not prohibit employers from requiring, as a condition of an employment contract, that an employee not join a labor union. The Court held that the objective of "leveling inequalities of fortune" impermissibly interfered with "personal liberty and property rights." Similarly, in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the Court invalidated a minimum wage law as violative of the due process clause. The number of such cases is by no means limited to these few examples, and, in fact, some of the precedent from this line of cases—*Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)—have been expressly relied upon by the Court in deriving the generalized right to privacy that has recently been used to strike down a wide variety of laws, including a law forbidding the sale of contraceptives over-the-counter to unmarried minors, see *Carey v. Population Services International*, 431 U.S. 648 (1977), and a law requiring a pregnant minor either to obtain parental consent or to notify her parents before getting permission from a judge to have an abortion, see *Bellotti v. Baird*, 443 U.S. 622 (1979).

Judge Bork has indicated that the adoption of any extraconstitutional values through the due process clause is an illegitimate judicial usurpation of legislative authority. See Bork, *The Constitution*,

Original Intent, and Economic Rights, 23 San Diego L. Rev. 823 (1986). Judge Bork has therefore clearly indicated that he will apply the Constitution neutrally. He will not put his views ahead of the law by prohibiting States from adopting progressive social reform legislation that interferes with free market. By the same token, he will not put the views of certain groups ahead of the law and recast the Constitution to accommodate their agenda. He will apply the Constitution and laws of the United States neutrally, without regard to the results. It is therefore most difficult to discern a *principled* or *consistent* basis for opposing Judge Bork's confirmation as Supreme Court Justice. Accordingly, it must be that Judge Bork's opponents deem fit only those judges who invent rights with which they agree. If the radical agenda consequently becomes a litmus test for confirmation to be a Federal judge, this irretrievably politicizes the judiciary, threatens its basic independence, and makes an end run around the democratic process to produce results that the people do not want and that are deeply rooted only in the conscience of the special interest groups and of a majority of the life-tenured, unelected Justices of the Supreme Court before whom these groups argue.

G. A MAINSTREAM JURIST

Opponents of Judge Bork's nomination say he is an extremist and outside the mainstream of constitutional thought, and that if confirmed he will disrupt the delicate balance of the Supreme Court. These two charges, however, pose an inherent contradiction. If Judge Bork is such an extremist, he will plainly be unable to obtain the four votes necessary to impose his will on the Supreme Court. By the same token, if he can command the votes necessary to craft a majority, that must mean that a majority of the Supreme Court is outside the mainstream.

The latter proposition merits closer examination. Is Justice Scalia, confirmed unanimously just last year by this body, outside the mainstream? Is Justice O'Connor, confirmed unanimously by the Senate in 1981, outside the mainstream? Is Justice White, an appointee of President John F. Kennedy, outside the mainstream? Is Chief Justice Rehnquist, twice confirmed to the Supreme Court by this Senate, outside the mainstream? Are all these distinguished members of the Supreme Court extremists? The answer clearly must be in the negative. Yet it cannot be said that Judge Bork is an extremist who will command the votes of this working majority of the Court without also suggesting that these other four Justices are extremists outside the mainstream. Therefore, unless his vote will fail to "tip the balance" as claimed, Judge Bork too must be within the mainstream.

In fact, this Senate has confirmed men and women of integrity, and it is well known that Judge Bork's judicial philosophy of interpretivism—that is, interpreting, not making, the law—is well within the mainstream of constitutional thought. For example, Justice O'Connor has indicated her adherence to the interpretivist view. During her confirmation hearing, she asserted: "I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have

changed, but . . . I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, [and] its research on the history of that provision." *Nomination of Sandra Day O'Connor*, Hearings Before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 67 (1981). She also stated that she regarded the role of the judge as "appropriately one of judicial restraint." *Id.* at 108.

Justice O'Connor has repeated this theme since her appointment to the Supreme Court. In her dissenting opinion in *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2505-06 (1983), a case invalidating certain regulations on abortion procedures, she wrote:

Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"

If these views are not in the mainstream, it becomes very difficult to explain how Justice O'Connor was confirmed unanimously. It also becomes difficult to explain how she has built such an impressive record on the Supreme Court.

Justice Scalia, likewise, adheres to the philosophy that a constitutional judge's decisions must be guided by the original understanding of the Constitution. As a Justice, he has forcefully advanced constitutional interpretations according to the original meaning of the constitutional text. See, e.g., *Tyler Pipe v. Washington Department of Revenue*, 107 S. Ct. 2810, 2826-29 (1987) (Scalia, J., concurring) (arguing that "dormant" commerce clause jurisprudence is inconsistent with the text of the commerce clause and should be abandoned). Significantly, as a Circuit Judge, Justice Scalia joined Judge Bork's opinion in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), which held that there was no privacy right to engage in homosexual conduct, and which criticized the Supreme Court's open-ended privacy decisions. The *Dronenburg* opinion stated: "[W]hen the [Supreme] Court creates new rights, as some Justices who have engaged in the process state that they have done, lower courts have none of the[] [constitutional and historical] materials available and can look only to what the Supreme Court has stated to be the principles involved." *Id.* at 1395. The *Dronenburg* court also stated: "Aside from listing prior holdings, the [Supreme] Court [has] provided no explanatory principles that informs a lower court how to reason about what is and what is not encompassed by right of privacy." *Id.*

Indeed, if anything, Justice Scalia adheres to a stricter view of the degree to which a judge should follow the original meaning of the Constitution than has Judge Bork. One of the two cases in which Judges Bork and Scalia differed during their 4 years serving together on the D.C. Circuit was *Ollman v. Evans*, 750 F.2d 970, in which Judge Bork filed a concurring opinion stating that the increase in the number and size of libel claims required more judicial protection of libel defendants to ensure the freedom of the press.

See *Id.* at 993 (Bork, J., concurring). Judge Scalia dissented in sharp terms, stating that "not only is our cloistered capacity to identify 'modern problems' suspect, but our ability to provide con-dign solutions through the rude means of constitutional prohibition is non-existent." *Id.* at 1039 (Scalia, J., dissenting). Judge Scalia also described Judge Bork's opinion as "embark[ing] upon an exercise of . . . constitutional 'evolution,' with very little reason and very uncertain effect upon the species." *Id.* at 1036. If Judge Bork is outside the mainstream, it is difficult to understand why Judge Scalia's nomination to the Supreme Court just last year, was confirmed by a vote of 98-0. Judge Scalia voted the same as Judge Bork in 98% of the cases on which they both participated while serving together on the U.S. Court of Appeals.

Moreover, other sitting Justices have also embraced this interpretivist approach. For example, in *Bowers v. Hardwick*, 106 S.Ct. 2841, 2846 (1986), when the Court found that there is no constitutional right to engage in homosexual conduct, Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, wrote:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Similarly, Chief Justice Rehnquist has written:

John Marshall's justification for judicial review [in *Marbury v. Madison*] makes the provision for an independent federal judiciary not only understandable but also thoroughly desirable. Since the judges will be merely interpreting an instrument framed by the people, they should be detached and objective. A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution.

W. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 696-97 (1976). Surely, no one could reasonably contend that all of these Justices are outside the mainstream.

Historically, moreover, numerous other Justices, from widely varying positions on the ideological spectrum, have also shared the position that the original meaning of the constitutional text must guide constitutional interpretation. For example, in recent times, the great conservative Justice John Marshall Harlan expressed his agreement with the philosophy of original intent. In his separate opinion in *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970), he stated:

When the court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was com-

mitted, and it has violated the constitutional structure which is its highest duty to protect.

The great civil libertarian, Justice Hugo Black took a similar view. In his dissenting opinion in *Griswold v. Connecticut*, 381 U.S. 479, 513 (1965), he clearly articulated his belief that the Federal courts have only the limited task of applying and interpreting the text of the Constitution, rather than enforcing values not found in the Constitution. He stated:

While I completely subscribe to the holding of *Marbury v. Madison* . . . that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notion of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them.

Later in the same opinion, Justice Black definitively rejected the notion that there was any warrant in the open-ended terms of the 9th Amendment for the Justices to invalidate legislation because it was contrary to the moral value judgments of the Court. He forcefully argued:

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice" or is "contrary to the collective conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not "consider their personal and private notions." One may ask how they can avoid considering them. The Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are "[collective] conscience of our people. Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested any such awesome veto powers over lawmaking, either by the States or by Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine.

Id. at 518-19. No one, could seriously assert that this great Justice, an appointee of President Franklin D. Roosevelt, is outside the mainstream. Nor could anyone seriously make that charge against Judge Bork.

Justice Robert Jackson, another Roosevelt appointee to the Supreme Court, also sharply criticized judicial activism, which at the time had been marked by an aggressive use of the due process

clause to invalidate social and economic regulations with which the Justices did not agree. As an Assistant Attorney General in 1937, Robert Jackson decried this activist trend of reading extraconstitutional values into the Constitution. He stated:

Let us squarely face the fact that today we have two Constitutions. One was drawn and adopted by our forefathers as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of government The second Constitution is the one adopted from year to year by the judges in their decisions. . . . The due process clause has been the chief means by which the judges have written a new Constitution and imposed it upon the American people.

See Cooper and Lund, *Landmarks of Constitutional Interpretation*, 40 Policy Rev. 10 (1987). Thus, Justices Harlan, Black, and Jackson, three of the truly outstanding Justices of our era, have decried the use of values not rooted in the constitutional text to invalidate popular legislation. If Judge Bork is outside the mainstream, so are these giants of 20th Century jurisprudence.

This tradition of interpretivist judicial reasoning has deep roots in our Nations' history as well. For example, James Madison, perhaps the most influential of the Constitution's framers declared: "[If] the sense in which the Constitution was ratified by the Nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." 9 *The Writings of James Madison* 191 (G. Hunt ed. 1900-1910). Similarly, Thomas Jefferson stated:

"I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a [judicial] construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction . . . Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting." Letter from T. Jefferson to Wilson C. Nicholas (Sept. 7, 1803), collected in 10 *The Works of Thomas Jefferson* 10-11 (P. Ford ed. 1904-05) (as quoted in G. Haskins & H. Johnson, *History of the Supreme Court of the United States* 148 (1981) (Oliver Wendell Holmes Devise). The views of these influential men, who were active at the time our Constitution was framed and adopted, surely cannot be viewed as outside the mainstream, and neither can Judge Bork's. Further support for this view is drawn from the writings of some of the truly great Justices who have concurred in the interpretivist mode of constitutional construction. Chief Justice Marshall, for example, stated:

[T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said . . . [W]e know of no rules for construing [the Constitution] other than is given by the language of the instrument . . . taken in connection with the purpose for which [federal powers] were conferred.

Gibbons v. Ogden, 22 U.S. 1, 188-89 (1824). Justice Story likewise observed:

It cannot . . . escape observation that this Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy . . . [T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive suitable redress.

The Apollon, 22 U.S. 362, 366-67 (1824). Thus, the interpretivist view of constitutional adjudication adhered to by Judge Bork is not only within the mainstream of constitutional thought, it defines the mainstream.

H. JUDGE BORK AND JUSTICE SCALIA

The fact that Judge Bork is firmly situated within the constitutional mainstream is closely related to another, perhaps more interesting question that has already been raised. Last year, 98 Senators voted to confirm Judge Antonin Scalia to be an Associate Justice of the United States Supreme Court, and not one opposed the nomination. As discussed above, Justice Scalia, like Judge Bork plainly believes that the Constitution is to be interpreted as law, and not as a warrant for the imposition of the judge's moral predilections on society. If anything, Justice Scalia adheres to a more stringent view of the ability of judges to evolve constitutional guarantees to take account of modern circumstances than does Judge Bork. Compare *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring), with *id.* 1036 (Scalia, J., dissenting).

Judge Bork and Judge Scalia served together for 4 years on the D.C. Circuit. In 86 cases on which they sat together, they agreed 84 times. That is 98 percent agreement. And the only significant case on which they disagreed was *Ollman*, in which Judge Bork was to Judge Scalia's left. Many of the cases that became most controversial at Judge Bork's hearings, moreover, were cases joined by Judge Scalia on the D.C. Circuit. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Restaurant Corp. of America v. NLRB*, 801 F.2d 1410 (D.C. Cir. 1986); *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985) (dissent from denial of rehearing *en banc*); *Oil, Chemical, and Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). And yet no one has even attempted an explanation of why there is such controversy over Judge Bork when the Senate unanimously confirmed Judge Scalia to the Supreme Court just last year. Judge Bork's record shows that, like Justice Scalia, he has outstanding qualifications to be an Associate Justice of the United States Supreme Court, and should be confirmed for that position.

CIVIL RIGHTS

A. INTRODUCTION

If the social change is mandated by a principle in the Constitution or in a statute, then the Court should go ahead and bring about social change. *Brown v. Board of Education* brought about enormous social change and quite properly.

(Robert H. Bork, Testimony before the Senate Judiciary Committee, Sept. 16, 1987, at 91.)

B. CONSTITUTIONAL PROTECTIONS AGAINST RACIAL AND GENDER DISCRIMINATION

The Committee heard testimony confirming Judge Bork's unwavering commitment to equal justice under the law throughout his distinguished career. As a private practitioner, professor, Solicitor General and finally as a member of the Court of Appeals for the District of Columbia Circuit, Judge Bork's actions truly do speak louder than the allegation of his critics.

As a young associate in a large Chicago law firm, Judge Bork successfully fought to end the firm's policy of excluding Jewish lawyers. As Solicitor General, he moved quickly to put an end to the exclusion of the first black women, Deputy Solicitor General Jewel Lafontant, from meetings and policy decisions. He lent the power and prestige of his position to a movement designed to bring more women lawyers into the Justice Department. This personal commitment to civil rights became more and more evident to the Committee as it examined Judge Bork's positions on both Constitutional and statutory issues.

Judge Bork's dedication to the eradication of racial discrimination has been apparent from his earliest academic writings. Thus, in 1971, Professor Bork wrote of the 14th Amendment:

it was intended to enforce a core idea of black equality against government discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.

(Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 14-15 (1971).)

As a matter of Constitutional theory, Bork has been a consistent defender of the Supreme Court's decision in *Brown v. Board of Education*. In response to critics like Professor Herbert Wechsler

and Raoul Berger who argue that the framers of the amendment did not intend to affect segregated schools, Bork responds:

By 1954 it had become abundantly apparent—through repeated litigation—that separate was never equal. They were not equal psychologically and the facilities were not even equal physically. The Court was, therefore, faced with a necessity to disregard part of the framers' intention in order to save the other part. To have chosen separation rather than equality would have been to read the Equal Protection Clause out of the Constitution. It seems to me the Court was bound to choose equality.

(Speech at Federalist Society Convention, January 31, 1987.)

As Solicitor General Robert Bork translated these long-held beliefs into action. In his four years in that office, Solicitor General Bork represented the United States in 19 substantive civil rights cases that did not require him to defend the Federal Government. In 17 of these 19 cases, Bork's argument supported the civil rights plaintiff or minority interest. The NAACP Legal Defense Fund sided with Solicitor General Bork in 9 of the 10 civil rights cases where they both filed briefs. The Justice on the Court who most often adopted the position argued by Solicitor General Bork in these cases was William Brennan.

The Committee heard detailed discussion of cases like *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976), where Solicitor General Bork argued for full implementation of school desegregation through extensive bussing and school redistricting. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975), Solicitor General Bork filed an *amicus* brief successfully arguing that Congress had the power under Section 5 of the 14th Amendment to abrogate a State's sovereign immunity. The case involved sex discrimination under title VII. Because the plaintiffs sought a monetary award from the State, both the district and appellate court found that the 11th Amendment barred relief. Solicitor General Bork argued to the contrary, stating in his brief:

Congress . . . acted within its power to effectuate the Fourteenth Amendment in subjecting the states to the terms of Title VII to the same extent as private employers. The remedies are no less important to the goals of the statute than the rights conferred, and no more beyond Congress' power to prescribe.

Brief for the United States as Amicus Curiae at 8. The principle Solicitor General Bork helped to establish in the Fitzpatrick case is invoked again and again by civil rights plaintiffs seeking to enforce equal opportunity laws against the States.

Because of its specialized docket, the Court of Appeals for the District of Columbia Circuit does not often face substantive constitutional issues. Still, in a case involving constitutional rights, Judge Bork's vote came down firmly on the side of the individual in the face of governmental power. In *Emory v. Secretary of the Navy*, 819 F. 2d 291 (D.C. Cir. 1987), a black Navy captain claimed that the Navy promotions board had discriminated against him because of his race. Judge Bork voted to reverse the district court and to

firmly reject the government's arguments that constitutional guarantees do not apply to racial discrimination in military promotions. Judge Bork held:

[c]onstitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government. Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally protected rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals.

(*Id.* at 294.)

Many hours of testimony were devoted to discussion of the Constitutional protections against gender discrimination. Judge Bork's position was firm and clear: the Equal Protection Clause protects all persons against laws which are based on unreasonable assumptions or stereotypes.

In his earlier writings, Judge Bork criticized the loose "rational basis" test which the Supreme Court applied to gender classifications. He referred to cases like *Goeseart v. Cleary*, 335 U.S. 464 (1964), where the Supreme Court upheld discrimination against women bartenders as "improper and intellectually empty." Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 12 (1971). In testimony before the Committee, Judge Bork reaffirmed his rejection of this "toothless standard" which the Court used to uphold even the most arbitrary and discriminatory laws.

Judge Bork has also indicated his disapproval of a "group approach" to the Equal Protection Clause. Under this scheme certain groups are entitled to "heightened scrutiny" of laws which place burdens upon them, while other groups receive virtually no protection at all. Judges are forced to pick and choose among various elements of society, favoring some and disfavoring others, without any guidance from the text or history of the Constitution. Accordingly to Judge Bork, this "protected groups" approach as propounded by Dean John Ely of Stanford "channels judicial discretion not at all and is subject to abuse by a judge of any political persuasion." Catholic University Speech, March 31, 1982. Judge Bork indicated that if a group approach were adopted only racial and ethnic groups would be covered, since these were the only groups the framers had in mind.

Such an approach is, in Judge Bork's view, inconsistent with the language and history of Equal Protection Clause which prohibits denying "any person" equal protection under the law. Judge Bork indicated that he would follow the approach outlined by Justice Stevens in his opinion in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case, Justice Stevens wrote:

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause.

It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny" to decide such cases.

Judge Bork indicated that the Stevens' approach provided a much more coherent methodology for application of the Equal Protection Clause than does the group approach. It applies the clause to all persons *as individuals*. Under this view, all persons, including women, illegitimate children, aliens, and others are entitled to protection from classifications which do not rest upon a reasonable basis in fact.

For Judge Bork, the Equal Protection Clause prohibits unreasonable distinctions among *all* persons. In every instance, he would ask whether the trait being used to distinguish among citizens is in fact relevant because it actually tells the legislature something about a person's needs, abilities, or merit. If it is not a relevant trait to which a reasonable legislature would attach significance, then it is invidious discrimination and would be struck down.

According to Judge Bork this method of equal protection analysis is both more objective and more faithful to the language and intent of the Equal Protection Clause. A judge who claims adherence to the framers' intent and to neutral principles must search for a single standard which can be applied to all laws that distinguish between individuals on any basis. The search must begin with core concern of those who drafted the 14th Amendment which is, of course, racial classifications.

The central tenet of the 14th Amendment is that race is an unreasonable basis upon which to judge an individual's worth or status in the community. As Justice Stevens said, race is an attribute over which the individual has no control, which cannot be altered, and which tells society nothing about the individual's moral worth or ability. It is *per se* "unreasonable" for a legislature to make distinctions between individuals based on a trait which is so utterly irrelevant to any valid legislative goal.

In applying the Equal Protection Clause to gender classifications, Judge Bork would refer to the framer's concern with race for guidance. Gender, like race, is an immutable trait. It is a status over which the individual exercises no control, and it indicates nothing about a person's moral or intellectual stature. Since gender is irrelevant to almost all human activities, virtually any statute which limits the opportunities open to women because of their sex would not have a reasonable basis in fact.

In a discussion with committee members concerning the *Goeseart* case, Judge Bork indicated that there was no reasonable basis in fact for distinguishing men from women in determining who could obtain a bartender's license. The physical differences between men and women had no bearing on their relative abilities in that field. Judge Bork indicated that his test would operate to strike down any law which limited the employment opportunities open to women based on outmoded stereotypes. Since gender is irrelevant

to one's ability to be a doctor, lawyer or accountant, any restriction on women in any of these fields would, in Judge Bork's view, be as unreasonable as a law which disfavored people with blue eyes. In a letter dated October 1, 1987, to the Chairman of the Committee, Judge Bork outlined how he would apply the Stevens test:

By focusing on the factual differences between individuals, the reasonable basis test distinguishes between laws which rest on genuine distinctions between persons and those based upon mere stereotypes. A law which limits the combat duties of women in the armed forces may indeed have a reasonable basis. It may be a fact that certain battlefield tasks require a physical strength or speed which very few women possess. Outside of the narrow areas where physical differences between the sexes are relevant, the reasonable basis test would operate to strike down all laws based upon mere habit or assumption. Distinctions based upon outmoded stereotypes can never satisfy a requirement that they have "a reasonable basis in fact" because they are in essence counterfactual, they ignore the factual similarities between persons in favor of unsupported assumptions.

The results in cases like *Reed v. Reed* 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), would not change under my reasonable basis analysis. In *Reed*, the Court struck down a provision of the Idaho Probate Code which established an absolute preference for men over women in the appointment of administrators of estates. *Reed* was the first victory for women under the Equal Protection Clause, and the test applied by a unanimous court was remarkably similar to my own. The Court stated:

A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Reed, 404 U.S. at 76 (citation omitted). The preference for male administrators in *Reed* was not based on any factual difference between men and women, rather it was the product of an unthinking and *unreasonable* stereotype.

In *Frontiero*, the Supreme Court concluded that an Air Force regulation prohibiting women from claiming their spouses as dependents on the same basis as men offended the concept of equal protection. Four justices would have elevated sex to the category of suspect classifications applying "strict scrutiny." Justices Stewart and Powell joined by Chief Justice Burger and Justice Blackmun, applied the rational basis test as announced in *Reed*. The result for all eight Justices was the same: the preference for men rested on the outmoded stereotype that men are "breadwinners" and women are dependent upon them. Under my view, the same result would follow. The law had no reasonable basis in fact as applied to servicewomen like Sharron Frontiero,

whose husband was a student *dependent on her* for a large part of his support.

Judge Bork's record as Solicitor General and Court of Appeals Judge belies the assertions of some groups that he would not apply the Equal Protection Clause to gender discrimination. In *Vorchheimer v. Philadelphia*, 430 U.S. 703 (1977), Solicitor Bork filed an amicus brief arguing that the maintenance of single-sex schools violates the Equal Protection Clause if they are not equivalent in educational offerings to their coeducational counterparts. As a Judge, in the case of *Cosgrove v. Smith*, 697 F. 2d 1125 (D.C. Cir. 1983), Judge Bork held that male prisoners could state a cause of action under the Equal Protection Clause for gender discrimination in parole regulations.

C. CIVIL RIGHTS PROTECTED BY STATUTE

As all participants in the movement for civil rights will attest, Congress has played a leading role in enacting statutes protecting minorities, from the great post civil war Civil Rights Acts, now codified at sections 1981, 1982, 1983 and 1985 in title 42 of the U.S. Code, to the Civil Rights Act of 1964, including title VI on education, title VII on employment, the Voting Rights Act of 1965, among many other important statutes. Judge Bork has been in the forefront of the battle to apply and enforce each of these laws in a manner giving full effect to the intent of Congress. In this sense, Judge Bork is, and has, always been a jurist determined to uphold the rights passed into law by the elected branches of government.

It bears repeating that as Solicitor General, Mr. Bork filed briefs in favor of the minorities or women in 17 of the 19 civil rights cases that did not require the government to defend an agency policy, regulation or statute. Even the study cited by researchers critical of Judge Bork, comparing the civil rights amicus filings of Solicitors General Erwin Griswold, Robert Bork and Wade McCree, reveals virtually indistinguishable records—Griswold and Bork filed on behalf of the civil rights claimant in 76 percent of the cases, and McCree in 88 percent of the cases. The same pattern holds on the appellate court, where Judge Bork ruled in favor of the minority or female plaintiff in seven of the eight substantive civil rights cases he heard. He never rendered a decision less sympathetic to minority or female rights than that made by either the Supreme Court or Justice Powell.

The real key to Judge Bork's civil rights record lies in the landmark rulings he successfully argued to the Supreme Court or decided on the United States Court of Appeals for the District of Columbia Circuit.

1. TITLE VII

There is perhaps no statute more fundamental to civil rights than title VII of the Civil Rights Act of 1964, where Congress prohibited employment practices and devices discriminating on the basis of race, color, religion, sex, or national origin. In amicus filings in three related title VII cases, heard in three successive terms, Solicitor General Bork successfully advocated first that title VII confers rights that cannot be waived or barred by contractual

arbitration, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), that title VII remedies must be designed to "make whole" the injured employee and that proof of employment discrimination can be based on a discriminatory effect tests, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and finally, in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), that title VII relief includes a retroactive award of seniority status, even though the statute only mentions backpay. One paragraph in *Franks* summarizes how the Solicitor General's filings supported the case-by-case articulation of far-reaching rules which significantly eased the burden on plaintiffs in proving claims of employment discrimination on the basis of statistical evidence and discriminatory effects, as well as receiving full relief for any such violations:

We begin by repeating the observation of earlier decisions that in enacting Title VII . . . , Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, *Alexander v. Gardner-Denver Co.* . . . and ordained that its policy of outlawing such discrimination should have the "highest priority," *Alexander*. . . . Last Term's *Albermarle Paper Co. v. Moody*, consistent with the congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." . . . This is emphatic confirmation that federal courts are empowered to fashion such relief [including retroactive grants of seniority] as the particular circumstance of case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.

Franks v. Bowman Transportation Co., 424 U.S. at 747-48 (citations omitted).)

Moreover, notwithstanding this success in three landmark title VII cases, culminating in *Franks*, the Solicitor General made several even more sweeping arguments that were rejected by the Court. For example, in *Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court and Justice Powell rejected Solicitor General Bork's argument that even a wholly race-neutral seniority system violated title VII if it perpetuated the effects of prior discrimination. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court rejected that an employment test with a discriminatory effect was unlawful under title VII. And in *General Electric v. Gilbert*, 429 U.S. 125 (1976), the Court rejected Solicitor General Bork's argument that discrimination on the basis of pregnancy violated title VII. Three years later Congress recognized the force of Mr. Bork's argument when it amended title VII with the Pregnancy Discrimination Act. As Solicitor General, the point was already clear to Mr. Bork: "The fact that women have different physical attributes from men does not, without more, justify applying different rules to women employees based on those attributes. Discrimination is not to be tolerated [under title VII] under the guise of physical properties possessed by one sex." Brief of the United States as *Amicus Curiae* at 15.

Judge Bork's support for title VII continued on the D.C. Circuit. In *Palmer v. Schultz*, 815 F.2d 84 (1987), he held in favor of women foreign service officers alleging discrimination by the State Department in assignment and promotion. *Palmer* also held that title VII discrimination could be proved solely by statistical inference.

In *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405 (1985), Judge Bork joined in reversing the district court because it required plaintiffs to offer direct proof of discriminatory motive in order to establish a case of prima facie discrimination. The ability to establish a prima facie case of discrimination by indirect means is the bedrock of much modern day title VII litigation. Judge Bork refused to tolerate any backsliding from this hard won principle. The court also ruled that title VII cannot preclude organizations from alleging first and fifth Amendment claims. Finally, recognizing that title VII vests broad discretionary powers in the courts, Judge Bork twice joined opinions liberally construing its statutory requirement that complaints be brought within a specified period of time. *Jarrell v. U.S. Postal Service*, 753 F.2d 1088 (1985); *Nordell v. Heckler*, 749 F.2d 47 (1984).

Beginning in 1973 and extending through to 1987, Judge Bork has participated fully in the growth of title VII as a potent statutory right barring discrimination in employment. In all cases, he was promoted the broad remedial purposes of the Act intended by Congress.

Notwithstanding Judge Bork's strong record in expanding and enforcing the civil rights statutes, much attention focused on a three-page article he wrote some 25 years ago. In that article, Professor Bork prefaced his remarks on the proposed Civil Rights Act of 1964 by stating, "[o]f the ugliness of racial discrimination there need be no argument." Bork, "Civil Rights—A Challenge," *The New Republic*, August 31, 1963, 21-24 at 22. He went on to question the principle of government coercion of private associational decisions. The Congress which passed the Civil Rights Act recognized the validity of Professor Bork's concerns when it exempted certain quasi-private establishments—the so-called Mrs. Murphy's boarding houses—from coverage under the act.

Judge Bork has since publicly disavowed this opposition to the Public Accommodations Act both in the classroom at Yale and before this Committee in 1973. The Committee heard testimony from members of Judge Bork's staff at the Solicitor General's office including that of Ms. Jewell LaFontant, the first black woman to hold the post of Deputy Solicitor General. Ms. LaFontant was unequivocal in confirming Solicitor Bork's personal commitment to vigorous enforcement of the civil rights laws. Moreover, the nominee himself stated before the Committee:

I think the 1964 Act really did an enormous amount to bring the country together and bring blacks into the mainstream, and I think that is the way I should have judged the statute in the first place instead of on these abstract libertarian principles.

Note: With Judge Bork's record as appellate Judge and Solicitor General, as well as the testimony of Ms. LaFontant and Judge Bork, there can be no doubt that he has a strong commitment to

the enforcement of civil rights legislation which should not be impugned by dwelling on past statements which he has clearly disavowed.

2. VOTINGS RIGHTS

The Committee heard testimony concerning Judge Bork's two decisions in a case involving Section 5 of the Voting Rights Act of 1965. *County Council of Sumter County, South Carolina v. United States*, 555 F. Supp. 694 (D. D.C. 1983) and 596 F. Supp. 35 (D. D.C. 1984). Section 5 requires preclearance by the Attorney General of certain changes in voting procedures, and bans any change that would "have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1982). The Sumter County Council brought suit against the Attorney General seeking a declaratory judgment that its switch to an at-large system for election of councilmen did not violate section 5.

In the first decision, Judge Bork rejected the Council's argument that the switch from Gubernatorial appointment to at-large election did not constitute a change in voting procedures for purposes of the Act. He also voted to allow seven black residents of Sumter County to intervene in the action, finding that "[t]heir local perspective on the current and historical facts could be enlightening. . . ." 555 F. Supp. at 697.

In the final decision in the case, Judge Bork found that "a fairly drawn single-member district election plan would give black voters of Sumter County a better opportunity to elect candidates of their choice to the Sumter County Council than the at-large system does." 596 F. Supp. at 37. He thus refused to certify the new procedure, holding that the County Council had "failed to carry [its] burden of proving that the at-large system was not maintained.

. . . for racially discriminatory purposes and with racially discriminatory effect. *Id.* at 38. In our view, Judge Bork's decision in *Sumter County* underscores his commitment to the protection of voting rights.

Judge Bork reaffirmed that commitment in his testimony before the Committee, stating:

I think the Voting Rights Act has been enormously successful in improving the quality of black life, particularly in the South, because they became a voting group that politicians had to listen to once they got access to the polls.

The testimony also confirmed Judge Bork's unwavering commitment to an active judicial role in enforcing electoral fairness under the Constitution. Judge Bork reiterated his support for the principle of judicial oversight of legislative reapportionment announced in the case of *Baker v. Carr*, 369 U.S. 186 (1962), although as he indicated in 1971, he would decide these cases under the guarantee of a republican form of government embodied in Art. IV, § 4 of the Constitution. As Judge Bork wrote in 1968:

Population shifts and a number of other factors had left a number of legislatures wretchedly apportioned, and political routes to reform were blocked precisely because the ag-

grieved voters were underrepresented. The Warren Court can hardly be faulted for entering this previously avoided thicket. . . .

Bork, *The Supreme Court Needs a New Philosophy*, *Fortune*, December, 1968, p. 166.

Judge Bork indicated that he would apply the test enunciated by Justice Stewart in his opinion in *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 753-54 (1964). Under that analysis, legislative reapportionment plans which are irrational or which "permit the systematic frustration of the will of the majority of the State" would be struck down as unconstitutional.

Some witnesses and Committee Members expressed concern that Judge Bork would not apply the one-person one-vote rule. Judge Bork explained that such a rigid approach often leads to the division of cities and towns into separate voting districts, and can actually be used to dilute the voting strength of minority groups. Several academic panelists noted that there is growing discontent on the Supreme Court itself concerning the rigid standard. The case of *Karcher v. Dagget*, 462 U.S. 725 (1983) was mentioned. There Justices White, Powell and Rehnquist, joined by Chief Justice Burger dissented from a rigid application of the one-person one-vote standard to the New Jersey State legislature. Justice Powell, forcefully stated the dissenters' views when he expressed doubt that the Constitution "could be read to require a rule of mathematical exactitude in legislative reapportionment," and charged that the majority's by the numbers approach was "self-deluding." *Id.* at 784.

Judge Bork also indicated that he would apply the Equal Protection Clause to reapportionment cases. As he summarized his position before the Committee:

Nobody doubts that an apportionment which is discriminatory can be struck down. Nobody doubts that an apportionment which a majority cannot change should be struck down. The only question is whether this rigid formula [one person-one-vote] is good or not.

Some witnesses attempted to disparage Judge Bork's exceptional record on voting rights issues by suggesting that he is in favor of racially-biased poll taxes. This criticism is wholly unfounded. Judge Bork's only testimony on the subject of poll taxes in these hearings concerned the Supreme Court's decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). In *Harper*, the Court invalidated Virginia's \$1.50 poll tax. Judge Bork testified that "I have no desire to bring poll taxes back into existence. I do not like them myself." At the same time, Judge Bork explained that the Court's reasoning appeared to him to be deficient, views that he had given to this Committee in 1973. (*Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General*, Hearings before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 17 (1973).)

Judge Bork observed that, prior to *Harper*, "[t]he poll tax was familiar in American history and nobody ever thought it was unconstitutional unless it was racially discriminatory." He also pointed out that "Congress had just recently drafted and proposed" and the

states "had adopted an anti-poll tax amendment to the Constitution which this Congress carefully limited to federal elections so as to leave state poll taxes in place if states chose to have them. That seemed to me a little odd, therefore, that the Court would come along and mop up something that Congress [deliberately did not] amend the Constitution to accomplish." Judge Bork's comments seem uncontestable. Under the rationale of the *Harper* decision, the 24th Amendment is a pointless constitutional change.

Judge Bork's analysis of the *Harper* decision in 1973 and again in these hearings does not in any way suggest a weakened support for the voting rights of minorities. Judge Bork testified before the Committee that if the tax had been "applied in a discriminatory fashion, it would have clearly been unconstitutional." But, as Judge Bork pointed out, the *Harper* court simply ignored this issue. Justices Black, Stewart, and Harlan made much the same points in their dissents. *Id.*, at 672 (Black, J., dissenting); *id.*, at 683 n.5 (Harlan, J., dissenting).

Judge Bork stands with distinguished jurists on the Court in suggesting that nondiscriminatory poll taxes are constitutional. In 1937, a unanimous Supreme Court rejected a similar challenge to Georgia's \$1 poll tax. See *Breedlove v. Suttles*, 302 U.S. 277 (1937). At the time, the Court included such eminent jurists as Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, and Hugo Black. In 1951, the Court summarily rejected a challenge to the law struck down 14 years later in *Harper*. See *Butler v. Thompson*, 431 U.S. 937 (1951) (per curiam). Justices Felix Frankfurter, Robert Jackson, Stanley Reed, Harold Burton, Tom Clark, Sherman Minton, and Chief Justice Fred Vinson rejected the same arguments accepted in *Harper*, while Justice Douglas stood alone in dissent. Thus, many distinguished justices agreed with Judge Bork's view of the issue, to say nothing of the three dissenters in the *Harper* decision, Justices Black, Harlan, and Stewart.

A number of respected commentators concur with Judge Bork's observation in analysis of *Harper*. Alexander Bickel agreed with Justice Black's dissent that the Court gave "no reason" for its decision. A. Bickel, *The Supreme Court and the Idea of Progress* 59 (1970), and Professor Cox conceded that the opinion seemed "almost perversely to repudiate every conventional guide to legal judgement." A. Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* 125, 134 (1968). Professor Kurland, who has harshly criticized many Warren Court decisions, called *Harper* "one of the Court's shakiest opinions." P. Kurland, *Politics, the Constitution, and the Warren Court* p. 164 (19—).

The Court's stated rationale was the "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." 383 U.S. at 668. But the Supreme Court has since flatly rejected *Harper's* suggestion that wealth-based classifications are subject to heightened judicial scrutiny in an opinion authored by Justice Powell. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). Similarly, notwithstanding *Harper*, the Supreme Court has subsequently upheld a number of State-imposed restrictions on voting. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding prohibitions on voting by convicted felons); *Oregon v. Mitchell*, 400

U.S. 112 (1970) (upholding minimum age requirements for state voters). Judge Bork's views on the *Haprer* decision thus seem to find sympathy among the current members of the Court.

3. EQUAL PAY ACT

Corning Glass v. Brennan, 417 U.S. 188 (1974), is recognized as a landmark Equal Pay Act case. In this case Solicitor General Bork filed an amicus brief arguing that men could not be paid more than women for similar jobs on different shifts. The brief gives full effect to congressional will seeking to thwart reduced payments to women performing the same work as men.

Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984), follows directly in the path established by *Corning Glass* and conclusively demonstrates Judge Bork's commitment to upholding women's rights. Judge Bork rejects the argument made by the airline that women performing essentially the same job as men could be paid less because they were called stewardesses instead of pursers. The language of the per curiam opinion demonstrates Judge Bork's clear, practical reasoning: "[N]either Congress nor the Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different." *Id.* at 1080.

Similarly, in *Ososky v. Wick*, 704 F.2d 1264 (1983), Judge Bork agreed that the Equal Pay Act covers women employed in the foreign service. This is but one of many cases in which Judge Bork flatly rejected the government's argument. In fact, Judge Bork joined in reversing the district court judge who had dismissed the suit on procedural grounds and expressed "grave doubts" that the Equal Pay Act applied. The government argued that the Act's principle of "equal pay for equal work" is incompatible with the flexible personnel system used by the Foreign Service, which is designed to accommodate regular, worldwide transfers of highly qualified personnel without adjusting salaries precisely to the job. Judge Bork found no indication that Congress silently intended an exemption for this executive agency and therefore refused to carve out special relief, even for an agency claiming exceptional need.

Again, the record is clear. For more than a decade, and indeed long before the issue of gender based wage discrimination was a visible public issue, Judge Bork has pursued Congress's directive that equal pay be given for work equal in "skill, effort, responsibility." 29 U.S.C. § 206(d). Twice he ruled or argued against large corporations, and once against the executive branch. This typifies Judge Bork's jurisprudence and his commitment to carrying out the intent of Congress that the civil rights laws in this country be vigorously enforced.

4. TITLE VI

Title VI of the Civil Rights Act includes a provision banning discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." First a district court, and then an appellate court found that this provision was not violated when a public school system

took no affirmative steps to teach English to 1,800 students of Chinese ancestry. The full court voted to deny a rehearing, leaving intact the appellate court's decision that "every student brings to the starting line of his educational career different advantages and disadvantages" and that the act does not impose affirmative teaching obligations on the school system. Despite these rulings below, Solicitor General Bork not only filed an amicus brief urging reversal, but he successfully argued that title VI reached actions with only a discriminatory effort, even absent any discriminatory intent. He thus simultaneously put the Government on record that the title VI prohibition on discrimination applies broadly and can be proven without evidence that the defendant intended to discriminate. In 1973, these were leading and unsettled issues in civil rights law.

D. RUNYON v. MCCRARY AND STATE ACTION

Solicitor General Bork led the fight on behalf of the Government in 1976 establishing, for the first time, that the post civil-war statute now codified at 42 U.S.C. § 1981 prevented private schools from denying admission to children solely because they were black. *Runyon v. McCrary*, 427 U.S. 160 (1976). Section 1981 assures to blacks and all minorities the same right to make and enforce contracts as whites. As pointed out by the dissent in *Runyon*, the statute for almost 100 years had reached only discrimination imposed by State law. Justice Powell in a concurring opinion found the dissent's reading of the statute "quite persuasive," but felt bound by the Court's prior precedents. The dissent expressly denied, however, that there was binding case law extending the reach of Section 1981 to the enforcement of private contracts between non-consenting parties.

Notwithstanding this dispute over the text and history of the statute, Solicitor General Bork argued that section 1981 "reaches the actions of private individuals not in any way facilitated by state law." Amicus Brief for United States at 11. He further argued that section 1981 should not in any event be restricted to a "purely literal interpretation" since a contract for schooling "is at the core" of the statutory rights afforded to blacks. *Id.* Finally, he rejected respondents' claim that forced enrollment would violate their right of association or an asserted constitutional right of privacy. The majority of the Court accepted every one of these arguments and firmly established the broad reach of Section 1981 to prohibit even purely private acts of discrimination.

This successful advocacy in *Runyon*, demonstrates that Judge Bork was not showing an insensitivity to the rights of minorities when as a law professor he criticized the Supreme Court's state action rationale in *Shelley v. Kramer*, 334 U.S. 1 (1948). Judge Bork's questioning of the threshold reasoning in the case never extended to the result, where the Court struck down private racial covenants barring the sale of homes to blacks. Equally to point, the holding in *Runyon* would, as Judge Bork testified, "also bar the racially restrictive covenant that was involved in *Shelley v. Kramer*."

Shelley held that private racially restrictive covenants, no matter how "discriminatory or wrongful," did not in themselves violate

the Constitution, but that enforcement of the covenants in State court satisfied the State action requirement of the 14th Amendment. It is now widely acknowledged that the case did not state a neutral principle capable of explaining when private conduct is transformed into State action.

The concept of neutral principles is designed to test whether a court will take the ruling announced in one case and apply it to future cases that cannot in good faith be distinguished. As Judge Bork explained in his 1971 Indiana Law Article and explained again in his testimony, *Shelley v. Kramer* does not pass this test: "The difficulty with *Shelley* was not that it struck down a racial covenant, which I would be delighted to see happen, but that it adopted a principle, which if generally applied, would turn almost all private action into action to be judged by the Constitution."

Judge Bork illustrated this defect in *Shelley's* "neutral principle" with an example. "If people at a dinner party get into a political argument, and the guest refuses to leave when asked to do so by the host, and finally the host calls the police to have the unwanted guest ejected, under *Shelley v. Kramer* that would become State action, and the guest could raise the first Amendment. His first Amendment rights had been violated because a private person got sick of his political diatribe and asked him to leave and the police assisted. In that way, any contract action, any tort action, any kind of action can be turned into a constitutional case."

Judge Bork's analysis in *Shelley* is now conventional wisdom. For example, Professor Tribe writes that *Shelley's* reasoning "consistently applied would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." Professor Tribe quite clearly notes that *Shelley*, had it been further applied, would have reduced the state action requirement to a mere formality, which the Court self-evidently has refused to do. L. Tribe, *American Constitutional Law* at 1156-57 (1978). For example, Justice Black, in a 5-2 decision, found no state action even though a state court enforced the explicit, racially discriminatory terms of a donor's will after a trust failed that had conveyed park land to the city for the sole use of whites. *Evans v. Abney*, 396 U.S. 435 (1970). The Court rejected Justice Brennan's argument that *Shelley* applied. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), a fraternal lodge allegedly would not serve a man a drink solely because he was black. The court held, in a 6-3 opinion written by Justice Rehnquist, that the liquor license awarded by the state did not "in any way foster or encourage racial discrimination" and therefore there was no State action entitling Irvis to broad relief. *Id.* at 176-77. See also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

Most recently, Justice Powell, in one of his last opinions for the Court, summarized the governing test for state action: "[The government] can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. 5061,

5067 (June 25, 1967). The state action rationale in *Shelley* self-evidently cannot be reconciled with this new standard: the court did not there encourage the private discrimination or force the parties to adopt the racially restrictive covenant. As predicted by Judge Bork in 1971, and now confirmed in 1987, "[*Shelley*] has no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. [The Court] did what it did; it adopted a principle which the Court has never adopted again."

In sum, Judge Bork's accurate and now-accepted critique of *Shelley* in no way endorsed racially restrictive covenants. This criticism is misplaced because Judge Bork, like Professors Herbert Wechsler and Louis Henkin before him, criticized the theory of State action, not the underlying decision on the merits. It is irrelevant because Congress in 1968 foreclosed the use of racial covenants in the Fair Housing Act. It ignores the virtual isolation of *Shelley* in subsequent Supreme Court case law, culminating with Justice Powell's decision in *San Francisco Arts*. As noted, it ignores Solicitor General Bork's successful advocacy in *Runyon*, where he proved by his actions his commitment to striking down private discriminatory contracts previously thought to be beyond the reach of the nation's civil rights laws.

E. VINSON v. TAYLOR

Some witnesses suggested that Judge Bork's dissent from a denial of rehearing in the case of *Vinson v. Taylor*, 753 F.2d 141, rehearing *en banc* denied, 760 F.2d 1330 (D.C. Cir. 1985), *aff'd in part and remanded sub nom. Meritor Savings Bank v. Vinson*, 106 S. Ct. 1299 (1986), indicated his hostility to sexual harassment claims under title VII. Much of the contrary, testimony before the Committee indicated that Judge Bork, joined by then-Judge Scalia and Judge Starr, was simply flagging important legal issues whose resolution was necessary to the fair and evenhanded application of title VII to these claims.

The case involved a sexual relationship between Mechele Vinson, a bank employee, and Sidney Taylor her supervisor. The district court had found that:

[I]f [Vinson] and Taylor did engage in an intimate or sexual relationship during the time of [Vinson's] employment at Capital, that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.

Vinson v. Taylor, 23 Fair. Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980). The district court dismissed Vinson's title VII claim, but a three-judge panel of the Court of Appeals reversed that decision.

Judge Bork disagreed with the panel's legal rulings on the liability of Taylor's employer for his actions. In its review of the panel's decision, the Supreme Court agreed with Judge Bork on both of these issues.

On the evidentiary issue presented in *Vinson*, Judge Bork believed that the panel was wrong in holding that "a supervisor must not be allowed to introduce . . . evidence of an employee's dress or

behavior in an effort to prove that any sexual advances were *solicited or welcomed*." 760 F.2d at 1331. The Supreme Court said that the panel was wrong in excluding this evidence because "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." 106 S. Ct. at 2407.

On the liability issue of *Vinson*, Judge Bork disagreed with the panel's imposition of automatic liability on an employer for an employee's harassment, noting that "we ought to take up the difficult and important question of the employer's vicarious liability under Title VII for conduct he knows nothing of and has done all he reasonably can to prevent." 760 F.2d at 1331. On the liability issue, the Supreme Court stated "we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by the supervisors." Like the Supreme Court, Judge Bork was concerned to distinguish between the voluntary office romance and the case of unwelcomed advances by a superior. Judge Bork never questioned the applicability of Title VII to sexual harassment cases, he merely noted a need for sensitivity and flexibility in doing so. *Vinson* is a prime example of Judge Bork's careful attention to complex legal issues, his insights were adopted by a unanimous Supreme Court.

KATZENBACH V. MORGAN

The Committee also heard testimony that in Judge Bork's view section 5 of the 14th Amendment gives Congress broad remedial authority to eradicate unlawful racial discrimination. This has been Judge Bork's publicly stated view since the early 1970's when he wrote that "it seems beyond doubt, then, that Congress has substantial power over the remedies used by Federal courts, even in constitutional cases, and that the source of that power in desegregation cases is located in section 5 of the Fourteenth Amendment." (The Constitutionality of the President's Busing Proposals at 16-17 (1972).)

Pursuant to the section 5 power, Congress suspended the use of literacy tests in states with a history of discrimination, as affirmed in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Judge Bork expressly approved this holding, 1973 Confirmation Hearings at 16, and this use of remedial power because Congress acts properly whenever "it attempt[s] to relate the prohibition [of literacy tests] to any criterion indicating the discriminatory use of literacy tests."

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), decided the same year as *South Carolina v. Katzenbach*, the Supreme Court upheld a provision of the Voting Rights Act barring the use of English language literacy tests for any person who had completed sixth grade in Puerto Rico, whether or not there was any indication that such tests were used to discriminate. The case has long been controversial, not because of its holding, but because the Court seven years earlier said a State's nondiscriminatory use of literacy tests *does not* violate the 14th Amendment. *Lassiter v. Northhampton Election Bd. of Elections*, 360 U.S. 45 (1959). As has been pointed out by numerous scholars, including Judge Bork, Congress expanded and

redefined the scope of the 14th Amendment *after* the Supreme Court had spoken. This challenges the well-settled principle that the Court is final arbiter of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In the words of Archibald Cox:

The [Morgan] Court held that Congress effectively determined that a State [literacy] law violated the Fourteenth Amendment and set it aside even though the Supreme Court—so often billed as the ultimate interpreter of the Constitution—would have sustained the same law."

(Cox, the Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199, 228 (1971).)

For this reason, Justice Harlan and Stewart dissented in *Morgan*, writing that the decision was "at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function." 384 U.S. at 659. Four years later, the majority of the Court explicitly rejected that *Morgan* rationale in considering the constitutionality of Congress' attempt to lower the voting age from 21 to 18. *Oregon v. Mitchell*, 400 U.S. 112 (1970). And in 1980, Justice Powell applied the argument to the 15th Amendment, holding that "Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights." (*City of Rome v. United States*, 446 U.S. 156, 200 (1980) (Powell J., dissenting).)

In short, Judge Bork, in the best of company, criticized *Morgan* in order to protect the Court's power to safeguard constitutional privileges against encroachment by the political branches. At the same time, Judge Bork has always strongly affirmed the authority of Congress to remedy discriminations, as evidenced by his support for *South Carolina v. Katzenbach*. This twin philosophy was put to the test when he testified before Congress against enactment of a Human Life Bill, which sought to expand and redefine the protection of the 14th Amendment to include features as persons, thereby barring abortion by statute and, in effect, overruling *Roe v. Wade*. As in *Morgan*, the law was not targeted to remedy discrimination and it would have "replace[d] the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution." (The Human Life Bill: Hearings before the Subcomm. of Separation of Powers of the Comm. on the Judiciary, 97th Cong., 1st Sess. 310 (1981).)

F. CONCLUSION

In response to question "where was Judge Bork on civil rights," the answer is in the Supreme Court fighting for the rights of minorities and on the appellate court expanding the protections of the Constitution, title VI, title VII, the Voting Rights Act and the Equal Pay Act.

RIGHT TO PRIVACY

Another area Judge Bork discussed was the Constitution's protection of individual liberty. As Judge Bork's testimony before, and subsequent letters to the Committee indicated, the Constitution protects numerous and important aspects of liberty. For instance,

the First Amendment protects freedom of speech, press, and religion; the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and the Sixth and Seventh amendments protect the right to trial by jury. All of these freedoms and more are fundamental. Judge Bork has made it quite plain that, in his view, a judge who fails to give these freedoms their full and fair effect fails in his judicial duty. But Judge Bork has also stated that merely because a judge must be tireless to protect the liberties guaranteed by the Constitution does not mean that judges should make up a right to liberty or personal autonomy not found in the Constitution. Once a judge moves beyond the constitutional text, history, and the structure the Constitution creates, he has only his own sense of what is important or fundamental to guide his decisionmaking. We believe, as Judge Bork does, that a judge has no greater warrant to depart from the Constitution than does Congress or the President. In other words, judges, even of the Supreme Court, are not above the law.

This means that where the constitutional materials do not specify a value to be protected and have thus left implementation of that value to the democratic process, an unelected judge has no legitimate basis for imposing that value over the contrary preferences of elected representatives. When a court does so, it lessens the area for democratic choice and works a significant shift of power from the legislative to the judicial branch. While the temptation to do so is strong with respect to a law as "nutty" and obnoxious as that at issue in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the invention of rights to correct such a wholly, misguided public policy inevitably involves the judiciary in much more difficult policy questions about which reasonable people disagree, such as abortion or homosexual rights.

As Judge Bork has told us, while a legislator obviously can and should make distinctions between such things as the freedom to have an abortion and the freedom to use contraceptives, a court cannot engage in such *ad hoc* policymaking. A court cannot invent rights that apply only in one case and are abandoned tomorrow in a case that cannot fairly be distinguished. The process of inventing such rights is contrary to the basic premises of self-government and inconsistent application denies litigants the fairness and impartiality they are entitled to expect from the judiciary.

This was the basis of Judge Bork's criticism of Justice Douglas' opinion in *Griswold*, the case invalidating Connecticut's statute banning the use of contraceptives. To put the decision in perspective, Judge Bork noted that *Griswold*, even in 1965, was for all practical purposes nothing more than a test case. The case arose as a prosecution of a doctor who sought to test the constitutionality of the statute. There is no recorded case in which this 1879 law was used to prosecute the use of contraceptives by a married couple. The only recorded prosecution was a test case involving two doctors and a nurse, and in that case the state itself moved to dismiss.

This point was made by Justice Frankfurter 4 years before *Griswold* in *Poe v. Ullman*, 367 U.S. 497 (1961), a case rejecting an earlier attempt to have the Connecticut law invalidated. In addition, Justice Frankfurter's opinion took judicial notice of the fact that

"contraceptives are commonly and notoriously sold in Connecticut drug stores," and concluded that there had been an "undeviating policy of nullification by Connecticut of its anticontraceptive laws throughout all the long years that they have been on the statute books." *Id.* at 502. Thus, it cannot realistically be said that failure to invalidate the Connecticut law would have had any material effect on the ability of married couples to use contraceptives in the privacy of their homes.

Judge Bork's principal objection to the majority opinion in *Griswold* was the Court's construction of a generalized right of privacy not tied to any particular provision of the Constitution to strike down a concededly silly law which it found offensive. Justice Black's dissent, joined by Justice Stewart, made precisely the same point:

While I completely subscribe to the [view] that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

381 U.S. at 513.

Justice Black proceeded to declare this unequivocal rejection of the existence of a general right of privacy based on the Constitution:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not.

381 U.S. at 508.

At the hearings Lloyd Cutler pointed out the similarities between this passage and Judge Bork's view: "He [Bork] does not agree intellectually with a generalized right of privacy. I believe that Justice Stewart did not agree intellectually with a generalized right of privacy." (Hearings, 9/23/87 at 144.)

Of course, Judge Bork has stated repeatedly that had the state actually sought to enforce the law against a married couple, questions under the Fourth Amendment as well as under the concept of fair warning would certainly have been presented.

Absent a violation of such a specific, constitutionally granted right of privacy, however, it is difficult to discern the constitutional impediment to the Connecticut law. In Judge Bork's view, Justice Douglas' attempt to do so by creating a free-floating, "right to privacy" does not state a principle of constitutional adjudication that was either neutrally derived or which would be neutrally applied in the future.

As Judge Bork noted in his *Indiana Law Review* article, the "zones of privacy" discussed by Justice Douglas do not really have

anything to do with privacy at all. These zones of privacy, he stated,

protect both private and public behavior and so would more properly be labelled "zones of freedom". If we follow Justice Douglas' next step, these zones would then add up to an independent right to freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society. . . . We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future.

Indiana Law Review article at 9.

In fact, Judge Bork's suggestions that the right of privacy was not really about "privacy" as such, that this right would not be applied consistently, and that it would lead the Court into much more difficult moral and social issues, have all proved prophetic.

For example, Judge Bork explained that the "privacy" right recognized in *Roe v. Wade*, 410 U.S. 113 (1973)—a right to terminate a pregnancy—is not really about privacy, but is more accurately described as a right to personal autonomy or liberty. Privacy refers to an interest in anonymity or confidentiality whereas liberty describes freedom to engage in a certain activity. The question in *Roe*, therefore, is whether any provision of the Constitution recognizes an individual right to terminate pregnancy against State intrusion. As Judge Bork testified, the Court's opinion in *Roe* made no attempt to ground such a right in the Constitution except to say that it was "founded in the 14th Amendment's concept of personal liberty and restrictions upon state action." *Id.* at 153.

This is Judge Bork's difficulty with the opinion. As Justice White's dissent, joined by Justice Rehnquist, stated, there is "nothing in the language or history of the Constitution to support the Court's judgment," which the dissent termed "an exercise of raw judicial power." The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." If the clause is read as written, then it guarantees that life, liberty, and property will not be taken without the safeguard of fair and adequate legal procedures to challenge the legality of the deprivation. Once such procedures have been given, and the legality of the deprivation established, the Due Process Clause does not establish an independent barrier to the deprivation. If, on the other hand, the clause is read to protect liberty against deprivation regardless of procedures, then the judge must have a theory for deciding which liberties are protected and which are not since no one would suggest that all liberty is immune from state regulation.

Justice Scalia has also rejected the generalized substantive due process right to privacy. Significantly, as a Circuit Judge, Justice Scalia joined Judge Bork's opinion in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), which held that there was no privacy right to homosexual conduct in the Navy, and which sharply criticized the Supreme Court's privacy decisions. The *Dronenburg* opinion stated:

[W]hen the [Supreme] court creates new rights, as some Justices who have engaged in the process state that they have done, lower courts have none of the [] [constitutional and historical] materials available and can look only to what the Supreme Court has stated to be the principles involved.

741 F.2d at 1395.

And Justice O'Connor has also been consistently opposed to the expansive, generalized privacy right that some Justices have found in the Constitution. In her dissenting opinion in *City of Akron v. Akron Center for Reproductive health*, a case invalidating certain regulations on abortion procedures, she wrote:

Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"

Similarly, just last year in *Thornburgh v. American College of Obstetricians*, another case in which state regulations on abortion were invalidated, Justice O'Connor forcefully dissented, asserting that "[t]he Court's abortion decisions have already worked a major distortion in the Constitution." Moreover, her refusal to accept the privacy right is not limited to the abortion context. She also joined in Justice White's opinion in *Bowers v. Hardwick*, 103 S. Ct. 2481, 2505-06 (1983), finding that there is no constitutional right to privacy, consensual homosexual conduct. Thus, Justice O'Connor has never endorsed any application of a right to privacy in any context.

As Judge Bork stated before the Committee, it would be inappropriate for him to give any indication of how he would vote as a member of the Supreme Court should the issue arise again. But suffice it to say that the question would be one of searching for an appropriate constitutional basis and precedent. And as Judge Bork has stated, not every incorrectly decided constitutional decision should be open to reconsideration.

As Judge Bork has explained, no one has ever been able to explain why some liberties not specified in the Constitution should be protected and others should not. As far as the Constitution is concerned, when it does not speak to the contrary the State is free to regulate. A judge who uses the Due Process Clause to give substantive protection to some liberties but not others has no basis for decision other than his own subjective view of what is good public policy. That is what the debate is really about. Should unelected judges stick to their constitutionally assigned role of neutrally interpreting and applying the law, or should they bend and ignore the law according to their policy preferences in order to reach results they like?

We are not without historical precedents that show what happens when unelected judges attempt to encroach upon the legislature's proper sphere. Attempts to read substantive protections of liberty into the Due Process Clause have failed in the past precisely because the clause gives no indication of which liberties are to

be preferred to others. In the early part of this century, for example, the Supreme Court read the due process clause of the Fifth and Fourteenth Amendments to protect a generalized liberty of contract, and routinely struck down laws that interfered with that liberty. Thus, in *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court invalidated a New York labor law limiting the hours of bakery employees to 60 hours a week. Similarly, in *Adair v. United States*, 208 U.S. 161 (1908), the Court struck down a Federal law prohibiting interstate railroads from requiring as a condition of employment that its workers agree not to join labor unions. and in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the Court held the District of Columbia's minimum wage law unconstitutional.

If the hearings former Secretary of HUD Carla Hills pointed out that Judge Bork's criticism of *Roe* and *Griswold* is based on his fear of a renewal of *Lochnerian* activism.

Judge Bork with Justice Black and a great number of other distinguished constitutional scholars who have criticized the logic, not the result, in *Roe* and the *Griswold* cases, seek to avoid precisely that type [i.e. *Lochnerian* of activism.

As Judge Bork points out, the Supreme Court's modern attempts to use the Due Process Clause as a substantive protection of liberty have also been unconvincing. Although the Court has held in *Roe* that a woman has a constitutional right to receive an abortion, it has more recently held that consenting adults do not have a constitutional right to engage in homosexual sodomy. See *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). Justice White's opinion for the Court in *Bowers* reasoned as follows:

It is obvious to us that neither ["the concept of ordered liberty" nor the liberties "deeply rooted in this Nation's history and tradition" formulation] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.

Id. at 2844.

The difference between these two decisions illustrates Judge Bork's point that it is impossible to apply the undefined right of privacy in a principled or consistent manner. It is difficult to understand why abortion is a constitutionally protected liberty but homosexual sodomy is not. Neither activity is mentioned in the Constitution, both involve activity between consenting adults, and "[p]roscriptions against [both activities] have ancient roots."

Judge Bork said it this way at the hearings:

[L]et me repeat about this created, generalized, and undefined right to privacy in *Griswold*. Aside from the fact that the right was not derived by Justice Douglas in any traditional mode of constitutional analysis, there is the: . . . we do not know what it is. We do not know what it covers. It can strike at random. For example the Supreme Court has not apply the right of privacy consistently and I think it is safe to predict that the Supreme Court will not. For exam-

ple, if it really is a right of sexual freedom in private, as some have suggested, then *Bowers v. Hardwick*, which upheld a statute against sodomy as applied to homosexuals, is wrongly decided. Privacy to do what, Senators? You know, privacy to use cocaine in private? Privacy for businessmen to fix prices in a hotel room? We just do not know what it is. (Emphasis added.)

Some have said that the principle may be that individuals have a constitutional right to use their bodies as they wish. Not only is this principle to be found nowhere in the Constitution, but also its application would invalidate laws against prostitution, consensual incest among adults, bestiality, drug use, and suicide, not to mention draft laws and countless safety measures such as laws requiring the use of seat belts and motorcycle helmets. This principle is thus far too general to support a particular decision without sweeping in these other cases. Unless the American people decide that judges should be given far more authority and responsibility for running our society, the Constitution requires that they follow the law.

As Carlos Hills said at the hearings:

I know that his criticism of *Griswold* was based upon its rationale. I know that he is concerned as a judicial activist with a vast undefined right of privacy, fearing that it removes the discretion from the elected bodies to a small group of judges who are unelected.

Many of the most respected constitutional law scholars have expressed profound disagreement with the reasoning and holding of *Roe v. Wade*, the leading example of substantive due process. These include Harvard Law School Professors Archibald Cox and Paul Freund, Stanford Law School Dean John Hart Ely, and Columbia Law School Professor Henry Monaghan. Dean Ely, a former law clerk to Chief Justice Earl Warren, stated in 1973 that

what is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the Framers' thinking respecting the specific problem in issues, any general value derivable from the provisions they included or the nation's governmental structure.

Similarly, Stanford Law School Professor Gerald Gunther, editor of the leading law school casebook on constitutional law, offered the following related comments on *Griswold v. Connecticut*:

It marked the return of the Court to the discredited notion of substantive due process. The theory was discredited in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard.

Some witnesses have urged the Ninth Amendment as a basis for invalidating State laws that restrict liberty or privacy not otherwise protected in the Constitution. As Judge Bork has explained, the Ninth Amendment provides no basis for doing so. The Ninth Amendment provides: "The enumeration in the Constitution, of

certain rights, shall not be construed to deny or disparage others retained by the people." The historical meaning of this amendment is revealed by the circumstances of its adoption. The original Constitution did not contain a Bill of Rights. Rather, it established a National Government of enumerated powers. But during the ratification debates, calls were made with increasing frequency by the so-called Anti-Federalists for adoption of a Bill of Rights. The Federalists raised two objections to inclusion of a Bill of Rights. First, it was said to be unnecessary because Congress would have no power to abridge fundamental rights of the people as the general government was one of enumerated, and therefore limited, powers. Second, the Bill of Rights was said to be dangerous because the reservation of certain rights might be read to imply that power was given to the Federal Government to regulate all others.

When James Madison became convinced of the need for a Bill of Rights, he defended his proposal as follows:

It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution. (1 Annals of Congress 456 (J. Gales & W. Seaton ed. 1834)).

The clause to which Madison referred was the provision that would later be adopted in somewhat shorter form as the Ninth Amendment. Thus, it appears that the amendment's instruction that the enumeration "of certain rights, shall not be construed to deny or disparage others retained by the people" was meant to prevent any implication, as Madison put it, "that those rights which were not singled out, were intended to be assigned into the hands of the General Government."

This means that whenever the Constitution does not grant the *power to regulate* conduct to the Federal Government, the people have a right to engage in that conduct free from *Federal* interference even though the conduct is not specified in the Bill of Rights. It must be emphasized that the "right" protected by the Ninth Amendment runs against the Federal Government when it undertakes to regulate individuals through an unwarranted expansion of its powers. For this reason, it makes little sense either textually or historically to speak of Ninth Amendment rights enforceable against the *States*. As Judge Bork has said elsewhere, if that were the meaning of the Ninth Amendment, then surely there would have been heated debate in the State ratifying conventions, and litigants and courts would have invoked the amendment in that capacity. That neither occurred is strong evidence that the amendment was not intended to create federally enforceable rights against the States.

Moreover, Judge Bork correctly states that even if one agrees with the recent suggestion that the Ninth Amendment protects natural rights against State and Federal intrusion, the nature and scope of those rights is undefined and virtually limitless. For example, John Locke, whose writings profoundly influenced the framers' view of "natural rights," regarded property and contract rights as among the most important natural rights of men. Accordingly, if the Ninth Amendment were to be interpreted as a grant of liberty against Government intrusion, it would necessarily include the freedom of contract. Of course, this would lead to invalidation of the worker protection legislation struck down by *Lochner* and its progeny, or any other form of economic regulation that hampers the "right" to contract.

Alternatively, members of the Supreme Court have invoked their own notions of natural law in the past. For example, Justice Bradley's concurrence in *Bradwell v. State*, 83 U.S. 130 (1873), upholding a law forbidding women from practicing law, states:

The natural and proper timidity and delicacy which belongs to the female evidently unfits it for many of the occupations of civil life. . . . [The] paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

But those who now urge reliance on the Ninth Amendment see a different set of natural rights emanating from the Ninth Amendment. For example, Professor Tribe filed a brief with the Supreme Court in *Bowers v. Hardwick* suggesting that one of the rights "retained by the people" under the Ninth Amendment is the right to engage in homosexual sodomy. Equally plausible are claims that the Ninth Amendment protects drug use, mountain climbing, and consensual incest among adults. Certainly the text of the amendment makes no distinction among any of these "rights." Therefore, unless the Ninth Amendment is to be read to invalidate all laws that limit individual freedoms, judges who invoke the clause selectively will be doing nothing more than imposing their subjective morality on society. The Constitution nowhere authorizes them to do so.

Although Justice Goldberg's concurrence in *Griswold* invoked the Ninth Amendment, Judge Bork has explained that the problems just discussed are probably the reason why the Supreme Court has *never* rested a decision on the Ninth Amendment. For instance, even Justice Douglas, the author of the majority opinion in *Griswold*, stated in a concurring opinion in the companion case to *Roe v. Wade*, that "The Ninth Amendment obviously does not create federally enforceable rights." *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). Unless someone can find a way both to read the Ninth Amendment to apply against the States and to discover which additional rights are retained by the people, there is no principled way for a judge to rely on the clause to invalidate State laws.

There is an additional matter that requires mentioning. There appears to be some confusion concerning Judge Bork's view of, and the Court's decision in, *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Skinner* held that a State statute requiring sterilization of recidi-

vist robbers but no embezzlers worked "a clear, pointed, unmistakable discrimination," *id.* at 541, and therefore violated the equal protection clause of the Fourteenth Amendment. It is important to understand the rationale given by the Court for its decision. The Court did *not* rely on a substantive due process right to privacy. In fact, the Court declined Chief Justice Stone's invitation in a separate concurrence to decide the case under the due process clause. Instead, the Court rested its decision squarely on the Equal Protection Clause: "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Id.*

In his 1971 article, Judge Bork was critical of what he believed to be the Supreme Court's inconsistent application of the Equal Protection Clause. He cited six cases as examples in which the Court both upheld and invalidated challenged classifications. One of the cases Judge Bork cited was *Skinner v. Oklahoma*. He did not cite *Skinner*, or any other case listed, for the correctness or incorrectness of its holding. Rather, Judge Bork's point was merely that it appeared that "the differing results cannot be explained on any ground other than the Court's preferences for particular values." (Indiana Law Review at 12.) This was the sum total of Judge Bork's "criticism" of *Skinner*, and it is a mischaracterization to suggest that Judge Bork's inclusion of *Skinner* in a string cite means that he disagrees with the decision in the case:

In his testimony, Judge Bork pointed out that the statute in question made a distinction between a robber and an embezzler and, with respect to that distinction, if the *Skinner* decision "had gone on and pointed out those distinctions really sterilized, in effect, blue-collar criminals and exempted white-collar criminals, and indeed, appeared to have some taint of a racial bias to it, [Douglas] could have arrived at the same decision in what I would take to be a more legitimate fashion."

In addition, Judge Bork noted that sterilization of criminals raises serious and independent questions under the Eighth Amendment's prohibition on cruel and unusual punishment, questions neither Judge Bork nor the Court addressed. In short, there is no reason to believe that Judge Bork would have any disagreement with the result reached by the Court in *Skinner*.

THE FIRST AMENDMENT

Judge Bork's testimony fully established that he would vigorously defend first Amendment freedoms. Judge Bork's judicial record plainly demonstrates his powerful solicitude for the freedom of speech and the press. His testimony also answered the concern expressed by some about a theoretical position on the first amendment that he arrived at when he was a law professor in 1971. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971). Judge Bork's testimony established that he had long ago publicly abandoned the aspect of his theory that some found most troubling—namely, that the first Amendment protects only "explicitly political" speech though he reaffirmed his view

that obscenity is unprotected. With respect to his strong criticism of the Holmes/Brandeis "clear and present danger test" for determining when the government can regulate speech advocating violent overthrow of the government or law violation, Judge Bork emphasized that his principle theoretical objection was with Holmes' rationale and that his objection to the test itself, as refined in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), was one of degree. Judge Bork also indicated that he was sufficiently comfortable with *Brandenburg* that he would accept it as being within a firmly established line of precedent that cannot be disturbed. In sum, Judge Bork affirmed the position that he accepts and would vigorously implement the current corpus of first Amendment doctrine.

JUDICIAL RECORD

As the hearings clearly revealed, Judge Bork's judicial record on the first Amendment demonstrates that, as an Associate Justice of the U.S. Supreme Court, Robert H. Bork would be a consistent and implacable foe of censorship. Judge Bork's opinions indicate that he would afford the press and broadcast media protection from censorship to a degree which sometimes exceeds under prevailing Supreme Court doctrine. His judicial writings also reveal a broad view of the coverage afforded by the first Amendment, notwithstanding earlier professional utterances to the contrary. Judge Bork's opinions show that his decisions are indifferent to any sympathy or hostility that he may feel toward the message or speaker at issue; he will permit no regulation of speech unless, consistent with Supreme Court precedent, the law is narrowly tailored to serve a compelling governmental interest.

Judge Bork's concurrence in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), is perhaps his most celebrated first Amendment opinion. This libel case is particularly important because it describes not only Judge Bork's first Amendment philosophy, but also his readiness to apply constitutional values to new threats that the Framers could not possibly have foreseen. In *Ollman*, Judge Bork's opinion was issued over a dissent by Judge (later Justice) Scalia, who stated: "It seems to me that the concurrence embarks upon a course of, as it puts it, constitutional 'evolution,' with very little reason and with very uncertain effect upon the species." *Ollman v. Evans*, 750 F.2d 971, 1036 (1984) (Scalia J., dissenting). Thus, Judge Scalia, whom this Committee and the full Senate unanimously approved for Associate Justice one year ago, sharply criticized Judge Bork for taking too *expansive* a view of individual liberties protected by the Bill of Rights. In *Ollman*, Judge Bork stated:

We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave unto our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be at the core of those clauses. Perhaps the framers did not envision the libel action as a major threat to that freedom. . . . But if, over time, the libel action becomes a threat to the central meaning of the

first amendment, why should not judges adapt their doctrines?

Id. at 996. Applying the constitutional value found in the first Amendment to modern circumstances, Judge Bork concluded that, while existing Supreme Court decisions had already established some safeguards to protect the press from the chilling effect of libel actions, "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit." *Id.* Accordingly, Judge Bork held that the lawsuit should be dismissed on the first amendment ground that the circumstances surrounding the allegedly defamatory statements showed them to be mere "rhetorical hyperbole" and therefore not actionable. *Id.* at 1010.

The *Ollman* opinion was hailed by liberal columnist Anthony Lewis as "an extraordinarily thoughtful judicial opinion." Lewis, *Freedom Not Comfort*, New York Times, Dec. 10, 1984, at A23. Similarly, libel lawyer Bruce Sanford said of Judge Bork's concurrence: "There hasn't been an opinion more favorable to the press in a decade." *Ollman* amply demonstrates that Judge Bork does not look for or mechanically apply the precise intentions of the Framers in applying his philosophy of originalism, but instead takes a broad view of the Framers' understanding of what they were protecting in the Bill of Rights. His opinion in *Ollman* also refutes the notion that his circuit court decisions are somehow not accurate indications of how he would decide cases as a Supreme Court Justice, because, perceiving a threat to a constitutional value contained in the Bill of Rights, Judge Bork went *well beyond* what Supreme Court precedent required in protecting the press from harassing libel actions. (See statement of Professor Michael McConnell, University of Chicago Law School.)

Similarly, while closely adhering to precedent, Judge Bork's opinions have shown that he believes that the Supreme Court has not gone far enough in protecting the broadcast media from government censorship. Prevailing Supreme Court case law has made an explicit distinction between the print media, the editorial content of which cannot be regulated, see *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and the broadcast media, the editorial decisions of which may be regulated according to such federal policies as the fairness doctrine and the requirement that persons criticized on the air be given a right to reply. (*Red Lion v. FCC*, 395 U.S. 367 (1969).) The distinction drawn by the Supreme Court rests on the so-called "scarcity doctrine," holding that the broadcast media, unlike the printed press, operate over scarce airwaves, and the fact of scarcity permits government regulation of the airwaves as a public trust.

In *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. 1986), Judge Bork faced a challenge to the Federal Communication Commission decision holding that teletext, a textual medium broadcast over a previously unused portion of the airwaves, could not be subject to government regulation because it

was akin to a print medium. Scrupulously adhering to precedent with which he disagreed, Judge Bork, joined by Judge (later Justice) Scalia, held that because teletext was broadcast over scarce public airwaves, *Red Lion's* scarcity doctrine necessarily governed. At the same time, however, applying the first amendment to modern, real life circumstances, Judge Bork argued that there was no principled way to distinguish print from broadcast media based on the scarcity of communications resources and, therefore, that *Tornillo* should preclude any government control over the editorial content of broadcasting. Judge Bork has repeated in other cases, as well, the theme that the editorial decisions of broadcasters deserve more protection than currently afforded by prevailing Supreme Court opinions, although he has consistently and rigorously adhered to controlling precedent. See, e.g., *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987); *Loveday v. FCC*, 707 F.2d 1443 (1983).

Although an examination of Judge Bork's theoretical views on the protections afforded by the first Amendment to nonpolitical speech will be reserved for a later discussion, it is also worth noting that his opinions on the D.C. Circuit demonstrate that, notwithstanding the position taken in Professor Bork's 1971 *Neutral Principles* article, Judge Bork has now embraced the more expansive, prevailing view of the scope of the first amendment. For example, in *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983), Judge Bork vigorously applied first amendment protections against harassing libel actions in the context of *scientific* speech. In *Brown & Williamson Tobacco v. FTC*, 778 F.2d 35 (D.C. Cir. 1985), Judge Bork, joined by Judge Scalia and Judge Edwards, vacated an injunction against false and deceptive cigarette *advertising* because it prohibited an extremely narrow class of advertisements that the court concluded would not be deceptive under the government's theory. In *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), Judge Bork joined Judge J. Skelly Wright's opinion invalidating a regulation requiring cable television operators to carry *general television programming* of local broadcasters.

Judge Bork has also taken a broad view of the kinds of entities subject to the first amendment. (Statement of Professor Michael McConnell, University of Chicago Law School.) Thus, in *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1985), Judge Bork filed a concurring opinion agreeing with his colleague Judge Wald that the first Amendment applied to the conduct of a private corporation which, at the behest of the federal government, dismissed an employee for remarks critical of the government. Judge Starr, a Reagan appointee to the D.C. Circuit, dissented. This expansive reading of the first Amendment's applicability occurred, moreover, in the context of a dispute involving *scientific* speech. This decision confirms that, notwithstanding some suggestions to the contrary at the hearings, Judge Bork's circuit court opinions do provide a reliable indicator of the kind of Justice he would be, for the application of the first amendment to private parties in this manner was an issue that the Supreme Court had never had occasion to address.

Judge Bork's opinions also established his open-mindedness and lack of result orientation by exhibiting an impartiality with respect to the claimant or message for which first Amendment protection

is sought. In *Lebanon v. Washington Metropolitan Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), for example, Judge Bork, joined by Judge Scalia and Judge Starr, ordered the Washington, D.C. subway system to lease space to an artist to display a poster highly critical of the President Reagan and members of his administration. He held that the subway authority's decision not to lease the space requested was based on a judgment about the content of the message and that the authority's action amounted to an impermissible prior restraint on free speech. After "an independent examination of the whole record," Judge Bork rejected the subway authority's defense that it was suppressing the poster because it was deceptive, going beyond his D.C. Circuit colleagues to protect free expression. (Statement of Professor Michael McConnell, University of Chicago Law School.)

Along the same lines, in *Finzer v. Barry*, 798 F.2d 1450 (1986), cert. granted, 107 S. Ct. 1282 (1987) Judge Bork rejected the first Amendment claim of a conservative group that was seeking to picket the Soviet and Nicaraguan embassies. The law at issue was an act of Congress prohibiting hostile demonstrations within 500 feet of a foreign embassy. Some concern was expressed about this opinion because the regulation upheld made distinctions about permissible speech based on the viewpoint expressed—that is, based on whether the demonstration was hostile or friendly to the foreign country. Judge Bork's opinion emphasized that making distinctions about permissible speech on the basis of viewpoint would only very rarely be constitutional, but that, in the extremely limited circumstances presented in *Finzer*, such a distinction was narrowly tailored to the compelling governmental interest of protecting the safety, peace, and dignity of foreign emissaries, an essential predicate to ensuring the safety and well-being of our own emissaries in foreign countries.

Moreover, as was pointed out, Judge Bork undertook a careful historical analysis of the treatment of foreign emissaries at the time of the adoption of the Constitution and Bill of Rights, as well as evidence of subsequent scholarly writings and government action in this area, before determining that the original understanding of the Constitution allowed for Congress to meet its obligation under the law of nations to protect foreign embassies from insult. See Hearings, 9/17/87 at 145-46. Moreover, Judge Bork also made it quite clear that he would have reached a different conclusion had the claimants presented evidence that the authorities were engaging in the "selective enforcement" of the law against disfavored groups. Judge Bork stated: "There was no allegation of selective enforcement in *Finzer v. Barry*. . . . Nobody attacked the law on grounds of selective enforcement. That would have been a different case." Finally, it is crucial to understand that the law sustained in *Finzer* does not prohibit or suppress criticism of foreign countries, but merely limits it to contexts outside the immediate vicinity of foreign embassies and consulates. People can say whatever they want, hostile or otherwise, about any foreign country; they simply cannot do it within 500 feet of its embassy. In sum, the opinion represents an extremely thoughtful and narrow treatment of a highly complex and close question of law.

Finally, the Supreme Court's treatment of Judge Bork's First Amendment decisions on the D.C. Circuit confirms that his views are consistent with prevailing jurisprudence in this area. Although the Supreme court has not yet considered any case in which Judge Bork wrote a majority opinion, *certiorari* has been granted in *Finzer v. Barry*, 798 F.2d 1450 (1986), cert. granted, 107 S. Ct. 1282 (1987), and a decision is expected this Term. The Supreme Court has also granted *certiorari* in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 666 (1986), an opinion in which Judge Bork dissented from a holding that the executive branch did not have statutory authority to exclude aliens on the basis of their political beliefs. The case turns exclusively on this administrative law question, because the Supreme Court, in an opinion by Justice Blackmun, has already conclusively decided that the first amendment permits Congress to exclude aliens based on their political beliefs. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 770 (1983). The Court has agreed with the First Amendment position taken by Judge Bork in the two instances in which it has reviewed his disposition of First Amendment issues. First, the Supreme Court reviewed the *en banc* decision of the D.C. Circuit in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1984), and, in an opinion by Justice White, joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, Stevens, and O'Connor, agreed with the dissenting position taken by Judge Bork, Judge Scalia, and several others. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Second, in *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986), Judge Bork and Judge J. Skelly Wright joined Judge Scalia's opinion holding that the Federal Government could constitutionally require the registration of certain foreign-sponsored films as "political propaganda." Although the D.C. Circuit decision was not reviewed by the Supreme Court, the Court heard an identical case from another Federal court reaching the opposite conclusion about the exact same films, and six of the eight Justices hearing the case (Justice Scalia recused himself) voted to adopt the position taken in the D.C. Circuit opinion joined by Judge Bork. See *Meese v. Keene*, 107 S. Ct. 1862 (1987).

POLITICAL SPEECH

Judge Bork's testimony fully answered the concern that some members of the committee expressed regarding his earlier, professorial position that the First Amendment applied only to "explicitly political" speech. See Bork, *Neutral Principles*, 47 Ind. L.J. at 27-28. First, he had long since publicly abandoned that strict, theoretical view of the First Amendment in favor of a theory that encompassed a considerably wider variety of communicative expression. (Hearings, 9/16/87 at 95-97, 109-110.) Second, to the extent that any difference remained between his present theoretical posture and prevailing first amendment doctrine, Judge Bork indicated: "There is now a vast corpus of First Amendment decisions, and I accept those decisions as law, and I am not troubled by them." (Hearings, 9/17/87 at 20.)

Professor Bork's 1971 article started with the proposition that the command of the first amendment—"Congress shall make no

Law . . . abridging the freedom of speech"—cannot be absolute. *Neutral Principles*, 47 Ind. L.J. at 21. Any such reading, he argued, would lead to such absurd results as forbidding Congress "to prohibit incitement to mutiny abroad a naval vessel engaged in action against the enemy, to prohibit harangues from the visitors' gallery during [Congress'] own deliberations, or to provide any rules of decorum in federal courtrooms." *Id.* Other examples of unprotected speech readily suggest themselves, such as an agreement among businessmen to fix prices, a conspiracy to assassinate a federal official, or, to borrow an example from Justice Holmes, shouting "fire" in a crowded theater. Accordingly, in order to discern the constitutionally protectible element of speech, Professor Bork sought to derive a neutral principle that would distinguish First Amendment "speech" from other human activities and forms of personal gratification. He found that the political function of speech—to quote Justice Brandeis, "the discovery and spread of political truth"—was the one aspect of speech "different from any other form of human activity." *Id.* at 26. He also believed that the necessity of free and robust political speech could be derived from the representative form of our constitutional democracy. Thus, Professor Bork's asserted that "the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment." 47 Ind. L.J. at 23. This view should answer the concern of those who suggested that, as a Justice, Judge Bork would rely solely on the text of the Constitution to discern basic constitutional liberties. He therefore concluded that only "explicitly and predominantly political speech" should be protected. *Id.* Professor Bork noted that "[t]he practical effect of confining constitutional protection to political speech would probably go no further than to introduce regulation or prohibition of pornography." *Neutral Principles*, 47 Ind. L.J. at 28.

Even in 1971, Professor Bork described the theories expressed in his article as "informal," "tentative," and "exploratory," intended to be "ranging shots" and "speculations." At the hearings, Judge Bork indicated that he had long ago abandoned his strict 1971 view on the first amendment. He explained: "I tried to follow a bright line. The bright line, I have become convinced, particularly since sitting on first Amendment cases on the court, the bright line is impossible."

Robert Bork's earlier public pronouncements confirm that this movement away from his early view occurred well before his nomination to be an Associate Justice of the U.S. Supreme Court. When asked about an interview in a 1985 edition of the *Conservative Digest*, in which he states: "I finally worked out a philosophy which is expressed pretty much in that 1971 *Indiana Law Journal* article that you have probably seen." Judge Bork explained that this remark was a reference to the first part of that article, which outlined the *theory of a general judicial philosophy* to which he still adheres, rather than to the second part of the article, which dealt with the first Amendment. The theory upon which he ultimately settled begins at the same starting point—the first Amendment protects discourse about the manner in which we as a society

order our own affairs—but abandons the bright line approach that protects only speech which is “explicitly political.” Instead, it would protect broad classes of speech because they feed the democratic process of self-governance. Thus, in the *ABA Journal* in January 1984, Judge Bork explained: “As the result of the responses of scholars to my [1971] article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes.” Bork, “Judge Bork Replies,” 70 *ABA Journal* 132 (Feb. 1984). Judge Bork added: “I continue to think that obscenity and pornography do not fit this rationale for protection.” During the hearings, Judge Bork was asked about his use of the terms “obscenity” and “pornography.” Judge Bork stated that his academic writings employ the terms interchangeably. To the extent that the Supreme Court has drawn a technical legal distinction between (unprotected) obscenity and (protected) pornography, Judge Bork indicated in his testimony that his use of the two terms interchangeably was an imprecise use of language. Similarly, in a radio address on June 10, 1987, Judge Bork stated that other forms of speech may “feed[] directly into the political process” and that “political speech—speech about public affairs and public officials—is the core of the amendment, but protection is going to spread out from there . . . [into] moral speech and scientific speech, into fiction and so forth.” (Worldnet, U.S. Information Agency, *Bicentennial of the U.S. Constitution* at 24-25 (June 10, 1987) (“Worldnet Interview”). This change in emphasis from a bright line theory apparently had occurred as early as 1973, for in his confirmation hearings to be Solicitor General, Professor Bork took the position that political speech was “the core of the first amendment,” and “as you move out from there the first amendment’s claims may still exist but certainly by the time . . . they reach the area of pornography, and so forth, the claim of first amendment protection becomes more tenuous.” *Nominations of Joseph T. Sneed to Be Deputy Attorney General and Robert H. Bork to Be Solicitor General*, Hearings Before the Committee on the Judiciary, United States Senate, 93rd Congress, 1st Sess. at 12 (1973). The line would be drawn at the point when “the speech no longer has any relation to those processes” by which we govern ourselves and becomes “purely a means for self-gratification.” (Worldnet Interview at 25) Although this line cannot be identified with “great precision,” Judge Bork’s theory would clearly put “forms of art . . . which are pornography and things approaching it” in the unprotected category. *Id.* at 25, 26-27. Judge Bork clarified his position that a court must examine all material that the community tries to suppress as obscene and make a judgment whether in fact the material meets the legal definition of obscenity.

This theory is compatible with the Supreme Court’s prevailing first Amendment doctrine. As Justice Brennan stated for the Court in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the “form of speech which the Framers of the Bill of Rights were most anxious to protect [was] speech that is ‘indispensable to the discovery and spread of political truth.’” *Id.* at 383 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Thus, Judge Bork’s theory of the first amendment and current Supreme

Court doctrine begin at the same core of political speech and then spread out to other protected areas. Consistent with Judge Bork's theoretical construction of the first Amendment, the Supreme Court has taken pains to relate first Amendment protections to society's self-governance in the broader sense. For example, in *Virginia State Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 764-65 (1976), the one major recent case in which the Supreme Court extended first Amendment protections to an area—commercial speech—that had previously been held to be unprotected, the Court explicitly sought to relate such speech to matters of public interest and to the way society runs its free enterprise system. Employing similar reasoning, Solicitor General Bork argued in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), that a prohibition against attorney advertising was unconstitutional because it burdened the right of citizens to obtain meaningful access to the courts. As with Judge Bork's theory, moreover, the Supreme Court has clearly indicated that the expanse of the first Amendment is not limitless, a notable example being that it stops short of protecting obscenity. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

Thus, any difference between the current state of first Amendment jurisprudence and the academic theory to which Judge Bork ascribes comes down to a matter of degree. It may well be that certain forms of art and literature—pornography, for example—fall on the side of pure self-gratification and consequently have nothing to do with the way in which we govern ourselves. See Worldnet Interview at 26-27. To the extent that Judge Bork might have difficulty drawing this line, that does not differentiate him in any way from the Supreme Court in its attempts to draw the line where material becomes obscene and therefore unprotected. Indeed, Justice Stewart, in a moment of sincere frustration, summarized the mode of analysis by which the Court grapples with this difficult question as applying the standard: "I know it when I see it." *Jacobellis v. Ohio*, 383 U.S. 413 (1966) (Stewart, J., concurring). But much of art and literature does feed the democratic process. As noted, during a radio interview prior to his nomination to be an Associate Justice, Judge Bork affirmatively stated that, under his academic theory, the first Amendment extends to "fiction," (Worldnet Interview at 25) and, in his testimony he cited the social satire of Henry Miller's *Tropic of Capricorn* as coming within his academic view of first amendment protections. "[I]f you read *The Tropic of Capricorn* by Henry Miller, you find a lot of stuff in there that is really political—criticism of the establishment and so forth. So that those things would be protected." (Hearings, 9/17/87 at 19.) Along these lines, concern was expressed that the novel, *Fanny Hill*, might not merit protection under Judge Bork's academic theory because the book "contains no political ideas whatsoever." (Hearings, 9/22/87 at 212). This simply misses the point; a work does not have to "contain" a political idea to warrant protection, but merely has to feed the democratic process by contributing to society's processes of critical self-examination. *Fanny Hill*, properly viewed as commentary about a particular stratum of our society, plainly qualifies for protection under such a rationale.

With respect to art, as well, protection is plainly not absent under the academic theory to which Judge Bork has ascribed over the years. It was noted in the hearings, for example, both the enormous relevance that the Bauhaus movement in art had for the political culture in Weimar Germany and the urgency with which the Nazis suppressed it. Such art would undoubtedly qualify for protection under Robert Bork's professorial view of the free speech guarantee. By contrast, the kind of "art" that his writings and speeches has repeatedly and paradigmatically excluded from first Amendment protection is pornography and obscenity. See, e.g., *Neutral Principles*, 47 Ind. L.J. at 29; *The Individual, the State, and the First Amendment* 15-17 (1979) ("University of Michigan Speech"); Bork, "Judge Bork Replies," 70 *ABA Journal* 132 (Feb. 1984); Worldnet Interview at 26-27. In this respect, a question posed about the Joffrey Ballet is useful in pinpointing the real area of theoretical controversy. Whether the Joffrey Ballet would be protected under a pure application of Judge Bork's academic theory is a question of line drawing the difficulty of which he has readily conceded, but the point is that the American people are not going to ban the Joffrey Ballet. Some local communities in this nation may well choose to ban nude dancing, however, and, as Judge Bork stated during his testimony, his view of the first Amendment would let these communities, through the political process, express their views on nude dancing.

Judge Bork's scholarly position on the Supreme Court's treatment of obscene speech in *Cohen v. California*, 403 U.S. 15 (1971), was also discussed during the hearings. Over the dissent of Justice Blackmun, joined by Chief Justice Burger and Justice Black, that case overturned the conviction of a person who wore into a courthouse a jacket emblazoned with an expletive directed at the military draft. Judge Bork's academic criticism of *Cohen* takes issue with the following reasoning of the majority opinion: "[W]hile the particular four-letter word being litigated is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." See *University of Michigan Speech* at 17-18; and (Hearings, 9/18/67 at 288). Professor Bork's objection is to the notion that the Constitution prohibits a community from expressing the moral judgment that disruptive obscenities are not to be uttered in its courts of law, especially when the "idea" carried by the obscenity can be expressed in other ways. The Supreme Court has apparently come to agree with the general principle that the Constitution does not invalidate all such moral judgments, for in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court permitted the FCC to sanction a radio station for broadcasting profane language, and in *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), the Court permitted a school to discipline a student for using profanity in a school speech. Indeed, during the hearings Professor Laurence Tribe of Harvard, while maintaining that *Cohen* was correctly decided on a technical issue of first Amendment law, agreed with the position that the use of certain offensive language may be suppressed as inconsistent with the decorum of a courtroom or, indeed, of the Senate.

Thus, it is clear that to the extent that Judge Bork's academic, professorial view of the scope of the first Amendment differs at all from that of prevailing doctrine, the difference is at most marginal. Any such difference is mitigated, moreover, by Judge Bork's philosophy of judging, as expressed in *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984), which prescribes the adaptation of constitutional provisions such as the first Amendment to protect conduct that the framers did not envision protecting when such a course becomes necessary to preserve a value central to the Constitution. Thus, to the extent that Judge Bork has acknowledged that the first Amendment's "outer reach and contours are ill-defined," *id.* at 995, such communicative conduct as art, literature, scientific speech, moral speech, and the like may well qualify for protection even at the margins, if for no other reason than to ensure the preservation of the values that they might add to public discourse. In any case, to the extent that any marginal differences may exist between Judge Bork's academic perspective on the first Amendment and the doctrinal status quo, Judge Bork stated in his confirmation hearings that he views existing first Amendment doctrine as being so deeply embedded in the fabric of our society and our law that he accepts it as settled precedent and feels comfortable giving it a full and fair application. Judge Bork stated:

I certainly have no desire to go running around trying to upset settled bodies of law which are not, to say the least, pernicious. . . . I would accept that line of First Amendment cases gladly, not grudgingly.

CLEAR AND PRESENT DANGER TEST

During the hearings, several members of the Committee questioned Judge Bork about his views on the application of the first amendment to speech advocating the violent overthrow of the government or the violation of the law. In this *Neutral Principles* article, 47 Ind. L.J. at 30-35, Professor Bork criticized the approach of Justices Holmes and Brandeis, which would permit the suppression of such advocacy only when there was a "clear and present danger" of immediate serious violence. See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., with whom Holmes, J. joined, concurring); see also *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., with whom Brandeis, J. joined, dissenting). Professor Bork's article also criticized the prevailing test adopted in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), which permits the suppression of "advocacy of the use of force or law violation [only] where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Professor Bork's critique of these cases was two-fold. First, at a philosophical level, he rejected the Holmesian notion that speech which would ultimately set aside the results of political speech and destroy the marketplace of contending ideas had protectible value in our republican system of government. Second, at a practical level, he believed that requiring a close nexus between the advocacy and the harm gave the courts power to make judgments more appropriately left with the political branches. During his testimony before this committee, Judge Bork indicated that he still believes that the

Holmesian rationale for the clear and present danger test is misguided, but that he no longer has any deeply felt practical objection to the *Brandenburg* test and accepts it as settled precedent.

In close questioning about his current views on *Brandenburg* and the clear and present danger test, Judge Bork reiterated his skepticism of Justice Holmes' position that speech which would lead to the forcible destruction of our republican system of government had protectible first amendment value. As a law professor, Judge Bork had sharply disagreed with Justice Holmes' famous statement that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, then the only meaning of free speech is that they should be given their chance and have their way." In a 1979 speech, he noted a logical fallacy in Holmes' argument—that is, if the "dominant forces in the community" did believe in proletarian dictatorship, it would not have to be instituted through the violent action of a minority. (University of Michigan speech at 20.) Judge Bork reiterated this view at the hearings. Second, he believed, and continues to believe, that the first Amendment does not require our republican system of government to tolerate the forces of its own destruction. *Id.* at 20, 21; *Neutral Principles*, 47 Ind. L.J. at 32.

This view is widely shared. For example, Justice Felix Frankfurter, writing for the Court in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 96 (1962), wrote that construing the first amendment to preclude resistance against subversion of our system of government "would make a travesty of that amendment and the great ends for the well-being of our democracy that it serves." Similarly, in *Dennis v. United States*, 183 F.2d 202, 212/13 (1950), *aff'd*, 341 U.S. 494 (1951), Judge Learned Hand wrote: "The advocacy of violence may, or may not, fail; but in neither case can there be any 'right' to use it. Revolutions are often 'right,' but a 'right' of revolution is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution." Yale Law Professor Alexander M. Bickel, who argued the *Pentagon Papers* case for the New York Times, echoed these sentiments in *Morality of Consent* 72 (1975). There is no indication that *Brandenburg* relies on the Holmesian rationale rejected by Professor Bork.

Given this fact, the practical difference between Judge Bork's academic position and that adopted in *Brandenburg* is merely one of degree. Both Judge Bork's academic position and *Brandenburg* recognize the legitimacy of society's protecting itself from violence and lawlessness. *Brandenburg*, however, requires a relatively close nexus between the harm sought to be prevented and advocacy of that harm before a legislature may suppress such advocacy. Professor Bork's academic position was that such judgments about the advocacy of lawlessness and forcible overthrow are "tactical" in nature and that courts should not require proof of such a tight nexus between advocacy and harm before permitting the legislative and executive branches to decide that there is an unacceptable threat to the well-being of society. See *Neutral Principles*, 47 Ind. L.J. at 33. In his testimony before this committee, however, Judge Bork indicated that, although *Brandenburg* requires a tighter nexus between advocacy and harm than he might urge as an origi-

nal theoretical matter, experience has shown him that our society has a remarkable degree of stability. Judge Bork stated:

I think that what I thought was wrong with *Brandenburg* then was that it did not take sufficient account of the danger of not one speaker but many speakers passing the same message of violent overthrow or violence. No one speech of which could produce violence or violent overthrow, but taken together, might produce a very dangerous situation. I now think that this society is not susceptible to that, even in its worst days, and I also think that the first Amendment says will we take that chance.

And, as a practical matter, he has stated:

I now accept, as a judge, the position that the law has reached [in *Brandenburg*], and I have no desire to overturn it. I have no desire to whittle it away.

On this point, Judge Bork was questioned about whether a 1985 speech that he gave at West Point did not suggest a recent and continuing practical uneasiness with *Brandenburg*. Judge Bork also discussed the first amendment and speech about violent overthrow in his June 10, 1987 radio interview. When asked to comment on the position he had taken in his 1971 article and in other writings prior to his appointment to the bench, Judge Bork carefully prefaced his response by stating "let me speak as I spoke back then rather than now because sometimes I have changed my mind, but I cannot take current positions." He then sought to dispel any impression that this statement might have left that he had in fact changed his mind. At the end of his remarks, Judge Bork again added a caveat, stating: "At least that was the position I took in the 1971 article." (Worldnet Interview at 27.) In the address referred to, however, Judge Bork merely made two points about *Brandenburg*, neither of which suggests a continuing skepticism about the operation of that case. First, he recounted a story from his days as Solicitor General suggesting that he had then preferred the formulation of the clear and present danger test used in Chief Justice Vinson's plurality opinion in *Dennis v. United States*, 341 U.S. 494 (1951), over the test adopted in *Brandenburg*. *The Constitution and the Armed Forces* at 9 (1985). Second, he stated that, as Solicitor General, he had argued that *Brandenburg* was an inappropriate test to apply in a military context, where discipline and morale are at a premium. *Id.* at 9-10. The oral argument that he was describing was in *Parker v. Levy*, 417 U.S. 433 (1974), and the Supreme Court accepted his position.

Finally, Judge Bork's testimony clarified a theoretical distinction between the kind of law violation discussed in his academic writings and the kind that is used to test the constitutionality of unconstitutional laws. Judge Bork, in testimony discussing advocacy of law violation, stated: "Now, I want to take out of this discussion the Martin Luther King kind of problem where often Dr. King was advocating violating a law to test its constitutionality—I have no problem with that. I am talking about the advocacy of law violation that is not aimed at framing a constitutional test." This testi-

mony essentially reiterated the following position that he had stated in an interview with a news magazine:

There's a large difference between advocating that things be burned down or blown up and urging a sit-in demonstrations. First, the civil rights demonstrators of the 1950s and 1960s premised their advocacy on the theory that the laws against things like integrated lunch counters were unconstitutional. And second, in our system, often the only way to get a disagreement about constitutionality into courts is to break the law, get arrested and then have the matter adjudicated.

(U.S. News & World Report, Sept. 14, 1987, at 22.) Judge Bork thus plainly recognized that one cannot be punished for the violation of unconstitutional laws. Contrary to the assertion of one of the witnesses, this position does not go against his academic writings on the advocacy of lawlessness. Judge Bork recognizes that the Constitution, as interpreted by the Supreme Court, is the supreme law of the land and supervenes to contrary state and federal enactments. Thus, when a person disobeys an unconstitutional, and therefore invalid law, it cannot be law violation in the sense addressed by Professor Bork's theories.

During the hearings, some question was also raised about Judge Bork's view of *Hess v. Indiana*, 414 U.S. 105 (1973), which he had criticized alongside *Brandenburg* in 1979. See University of Michigan Speech at 21-22. *Hess* involved an application of the *Brandenburg* test to advocacy of law violation, but also contained an additional element—the speaker in *Hess* publicly shouted an obscenity. Judge Bork's testimony indicated that he had no objection to the application of the *Brandenburg* test to the facts in *Hess*, but, at the same time, he questioned whether the independent fact of public obscenity should have been protected in that case. In other words, Judge Bork's belief that the public use of obscenity might have independently justified the criminal action against Mr. Hess has nothing to do with the separate and distinct fact that Mr. Hess had also advocated law violation. Indeed, Judge Bork stated explicitly:

I think there was a problem of obscenity in there and not just a problem of inciting to lawlessness. Now, if the gentleman had said what he said without the obscenities, that's right, *Brandenburg* covers it.

Moreover, while indicating he was "not wild about" *Hess* because of the obscenity element, *id.*, even with respect to that, Judge Bork indicated that he "would have to go back and look at [*Hess*]" before deciding whether he would or would not agree with the result.

SUMMARY

Judge Bork's testimony established that he has had an exemplary record on the first Amendment while on the bench. He also pointed out substantial areas of agreement between his earlier academic positions and prevailing first Amendment doctrine, and indicated that, to the extent there were differences, he accepted the Supreme Court's first Amendment jurisprudence as settled precedent.

SEPARATION OF POWERS

Judge Bork's testimony clearly established that, like Justice Brennan,¹ he views the separation of powers as a bulwark of our liberties. Accordingly, Judge Bork's approach to the separation of powers does not favor the executive, the legislative branch, or the judiciary; rather it seeks to discern the assigned role of each coordinate branch in our constitutional system. In deciding questions of standing to sue, for example Judge Bork, like Justice Powell,² believes that the limited Article III role of the Federal courts precludes the Federal judiciary from taking on a role that would involve it in abstract political disputes. On important questions regarding the constitutionality of the independent counsel, moreover, Judge Bork's record demonstrates that, while he believes that criminal prosecution may not be wholly insulated from the executive branch, he also accepts that some measures may be employed to shield a special prosecutor from political pressure. On the question of war powers, consistent with our constitutional scheme, Judge Bork's theory envisions congressional control over the major, strategic decisions of war and peace, but exclusive presidential authority on the tactical side of military operations.

Judge Bork has also taken several other positions clearly demonstrating that he has not pro-executive bias. He has taken an exceptionally narrow view of the doctrine of executive privilege, and believes that a deliberative process privilege inheres in each of the three branches. While he was Solicitor General, moreover, Judge Bork argued that a sitting Vice President could be indicted. Finally, the position that he took on the pocket veto while Solicitor General conclusively refutes any claim of pro-executive bias.

CONGRESSIONAL STANDING

Judge Bork's testimony concerning his views on "congressional standing"—views most fully expressed in his dissenting *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), vacated as moot, 107 S.Ct. 734 (1987)—confirms that his position is squarely based on the necessity of maintaining the constitutional limits on the role and powers of the Federal courts, and is in no way hostile to the constitutional powers of Congress. Indeed, Judge Bork's position is indistinguishable from the one adopted by then-Judge Scalia in *Moore v. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (concurring opinion), cert. denied, 105 S.Ct. 779 (1985): "no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest." Justice Scalia was confirmed unanimously, and it was not suggested that his rejection of the theory of

¹ *Northern Pipeline v. Marathon Pipe Line*, 458 U.S. 50, 57 (1983) (plurality opinion of Brennan, J.) ("To ensure against . . . tyranny, the Framers provided that the Federal Government would consist of three distinct branches, each to exercise one of the governmental powers the Framers recognized as inherently distinct."); *CFTC v. Schor*, 106 S. Ct. 3245, 3262 (1986) (Brennan, J., dissenting) ("In order to prevent . . . tyranny, the Framers devised a governmental structure composed of three distinct branches—a vigorous legislative branch, 'a separate and wholly independent executive branch,' and 'a judicial branch equally independent.'").

² For example, in his majority opinion in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), Justice Powell stated that the doctrine of standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society."

governmental standing (including congressional standing) should disqualify him as a nominee. There is no reason to apply a different standard to Judge Bork.

The reasoning that led Judge Bork in *Barnes* to the conclusion previously articulated by Judge Scalia is as follows: First, "the rationale which underlies congressional standing doctrine also demands that members of the executive and the judicial branches be granted standing to sue whenever their official powers are allegedly infringed by another branch or by others within the same Branch." *Barnes*, 759 F.2d at 53. If such suits—which were never even attempted prior to *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)—were to become familiar and routine, the result would be "general, continual, and intrusive judicial superintendence of the other institutions in which the framers chose to place the business of governing." *Id.* at 61. After examining Supreme Court precedent and a wealth of historical evidence concerning the original understanding of the limited powers of the Federal courts under Art. III of the Constitution, Judge Bork concluded that the theory of governmental standing is inconsistent with binding Supreme Court precedent and with Article III itself. That is why, as a lower court judge, he urged his colleagues to "renounce outright the whole notion of congressional standing." *Id.* at 41.

Thus, Judge Bork was entirely accurate when he testified that he is "not hostile to Congressional standing any more than . . . to Presidential standing or judicial standing." To the contrary, Judge Bork's central concern is that the theory of governmental standing makes "the judiciary the umpire and central branch of deciding questions, on a daily basis, between the other branches and between units of the other branches and so forth." For that reason, Judge Bork testified, "[i]n the routine kind of case in which the President and the legislative branch get into a squabble over whether an appropriations bill is being properly carried out, I think there should not be congressional standing or Presidential standing or judicial standing in that kind of a case and what I am really trying to protect—this is an aspect of my general philosophy of judicial restraint—what I am really trying to protect is to prevent the courts from stepping into legislative business."

Far from being inimical to the interests of Congress, then, Judge Bork's position will clearly serve those interests in the long run. A few examples should suffice to illustrate the problems that the theory of governmental standing would create if it were to become settled law. The President could sue Congress any time it enacted a law that the President believed infringed on his constitutional powers. (Even in the highly unlikely event that the Speech or Debate Clause would bar such a suit, the President could refuse to abide by the law on the grounds that Congress or its Members could sue *him* if they truly believed the law to be constitutional.) Members of Congress could challenge the allocation of committee seats between the two parties, as was unsuccessfully attempted in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983). Senators who believe that the filibuster is unconstitutional, or unconstitutional in a particular instance, could sue for a judicial answer to that question. If Congress were to enact the amendment to the Fair Housing Act currently being considered by this Committee, which

would give Administrative Law Judges the authority to adjudicate certain claims under the Act, a Federal district judge would have standing to challenge the legislation based on a claim that Article III judicial powers are being conferred on judges who lack the life tenure Article III requires.

Many more examples could be given, but the point was sufficiently made by Chief Justice John Marshall in a speech to Congress in 1820: "A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which has taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the law and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power . . . could exist no longer, and the other departments would be swallowed up the judiciary." 18 U.S. (5 Wheat.) Appendix at 3, 16. Suits in which standing is based on impairment of the respective governmental powers of the Branches or their officers bear little if any resemblance to "case[s] in law or equity," and to allow such suits would greatly expand the powers of the Federal judiciary, at the expense of the President, Congress, and the American people.

Judge Bork did acknowledge, however, that while he would "re-nounce [congressional standing] outright as far as the regular kind of case is concerned," there might be an "extreme case" in which "one might try to fashion a doctrine" that would allow standing on the part of Congress or its Houses to seek judicial resolution of a critical constitutional dispute with the President. As Judge Bork put it, "I have to admit that I do not know how that case would look to me if it comes and it is extreme enough." Thus, Judge Bork made plain that his general opposition to congressional standing might give way in the extreme case. He also acknowledged that if it could be established that "the horrible consequences that I imagined would flow from recognizing standing in these cases do not, in fact, flow, then a large part of my objection vanishes."

In order to put the issue of congressional standing in perspective, it is important to note several additional points. First, the Court of Appeals for the District of Columbia Circuit—the only court that has adopted the theory of congressional standing—has also fashioned a novel doctrine of "equitable" or "remedial" discretion that permits the court to refuse to decide the merits of the case even though the court finds that the congressional plaintiffs have standing. Indeed, the Court of Appeals has invoked this doctrine in many of the cases in which it has found congressional standing, and where this is done the result for the congressional plaintiffs is identical to the result of denying them standing. See, in addition to the *Vander Jagt* and *Moore* cases, *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), and *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

Second, it should be remembered that other "justiciability" doctrines, such as ripeness and the political question doctrine, may bar many of the suits congressional plaintiffs would bring were their standing recognized. In *Goldwater v. Carter*, 444 U.S. 996 (1979), the Court of Appeals had ruled that members of Congress had standing

to sue the President over his unilateral termination of a treaty with Taiwan, and had ruled in favor of the President. 617 F.2d 697 (D.C. Cir. 1979) (en banc). The Supreme Court held that the suit should be dismissed without reaching the merits, but there was no majority view as to how this result should be reached. Four Justices voted to dismiss the case under the political question doctrine (which would mean that the case could never be heard no matter what injury a particular plaintiff might allege), and Justice Powell voted to dismiss the case on the grounds that it was not ripe for judicial review. (In addition, one Justice did not participate, two Justices would have postponed review of the justiciability issues for fuller argument and briefing, and one Justice reached the merits without discussing standing). This certainly indicates that suits in which it might seem tempting to allow congressional standing may nevertheless be barred by other Article III limitations.

Finally, it should be noted that in many instances a private plaintiff would have standing to sue to raise the identical constitutional questions congressional plaintiffs might seek to litigate. As Judge Bork wrote in *Barnes*: "Many of the constitutional issues that congressional or other governmental plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and cognizable injury. That is entirely appropriate, and it belies the argument that this court's governmental standing doctrine is necessary to preserve our basic constitutional arrangements." 759 F.2d at 61.

In sum, Judge Bork's position on governmental and congressional standing is consistent with his philosophy of judicial restraint, and avoids a major expansion of judicial power for which there is no support in the Constitution or in Supreme Court precedent.

INDEPENDENT COUNSEL

Some questions were posed regarding views that Judge Bork had expressed on the constitutionality of special prosecutors in testimony he offered in 1973 as Acting Attorney General. There was some suggestion that the views expressed in that 1973 testimony cast doubt on whether he would sustain the constitutionality of the current independence counsel scheme established by the Ethics in Government Act. The testimony that Acting Attorney General Bork gave in 1973 was on legislation that was never enacted, and, Judge Bork recalled that, unlike the Ethics in Government Act, the Watergate Special Prosecutor bills would have established prosecutors wholly outside the executive branch—that is, subject to appointment, control, and removal by the judiciary. He also recalled that in his 1973 testimony he had asserted that a special prosecutor, if not appointed by the President by and with the advice and consent of the Senate, could be protected against removal by statute. He also noted that his 1973 testimony had asserted that "Congress probably could protect a special prosecutor from discharge except for cause." *Id.*, see *Special Prosecutor and Watergate Grand Jury Legislation*, Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93rd Cong., 1st Sess. 260-61 (1973) ("House Hearings"). It should be noted that a standard of removal very similar to that approved in 1973 by

Acting Attorney General Bork is currently that principal focus of a Justice Department's court challenge to the constitutionality of the Ethics in Government Act.

It is also worth noting that, although Acting Attorney General Bork's testimony strongly criticized provisions placing the appointment of the Watergate Special Prosecutor in the judicial branch, his testimony does not categorically reject the possibility of judicial appointment of a Federal prosecutor. Indeed, when questioned about the longstanding practice of having courts appoint Federal prosecuting attorneys on an interim basis, Acting Attorney General Bork noted that he did not object to the constitutionality of that practice because the prosecutor "remains subject to the control and direction of the Department of Justice and also remains subject to Presidential removal." House Hearings at 259. Thus, it appears that Acting Attorney General Bork's objection to judicial appointment is more aptly described as an objection to judicial appointment, direction, and control over criminal prosecution. This suggests that he might not find objectionable a scheme like that established in the Ethics in Government Act, which provides for judicial appointment of an independent counsel, but leaves considerable measures of control in the executive branch.

Moreover, Judge Bork has sat on two cases involving the Ethics in Government Act. In both cases, the Department of Justice argued that, if the court construed the statute to permit judicial control over certain prosecutorial decisions, the law would be unconstitutional. In *Nathan v. Smith*, 737 F.2d 1069 (1984), Judge Bork wrote a concurring opinion holding that the statute was constitutional because it left with the executive branch the important prosecutorial decisions at issue in the case. Similarly, in *Banzhaf v. Smith*, 737 F.2d 1167 (1984), Judge Bork joined a *per curiam* decision of the full D.C. Circuit court, which similarly construed the statute in a constitutional manner.

WAR POWERS

Some members of the Committee expressed an interest in Judge Bork's views on the War Powers Act. He has actually said very little on the subject, but noted in the late 1970s that some aspects of the Act are "probably unconstitutional." In his testimony, Judge Bork stated that he believed that the consultation and notification provisions of the Resolution were probably constitutional. He also noted that he believed the Act contained a legislative veto, which, at the time of his earlier remark on the Resolution, he "thought was probably unconstitutional." As Judge Bork's testimony indicates, the Supreme Court concluded that legislative vetoes are unconstitutional in *INS v. Chadha*, 462 U.S. 917 (1983).

While he has never undertaken any detailed analysis of the various specific provisions of the War Powers Resolution, Judge Bork's general approach to evaluating that law would be directly traceable to his view that "[t]he Constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach the tactical and managerial are for the President, while the major questions of war and peace are, in the last analysis, confined to Congress." Bork, *Comments on*

Legality of U.S. Action in Cambodia, 65 Am. J. Int'l L. 79-81 (1971).

His prior expressions of views on this sharing of authority, in fact, seem to be a rather uncontroversial application of clear principles set forth in the Constitution. As a law professor in 1978, Judge Bork stated in testimony on a bill to regulate foreign intelligence activities that

Congress clearly has the constitutional power to declare war or refuse to declare war. It also has the power to appropriate funds for armed conflict or refuse to do so. Congress has, in fact, the raw constitutional power to disband the Armed Forces altogether and leave the President as Commander in Chief in name only, without a single platoon to maneuver.

National Intelligence Reform and Reorganization Act, Hearings Before the Senate Select Subcommittee on Intelligence, 95th Cong., 2d Sess. 459 (1978) ("Senate Foreign Intelligence Hearings"). Professor Bork's Senate testimony on the National Intelligence Reorganization and Reform Act of 1978 suggested that highly "detailed control of" and "extensive restrictions on" the President's conduct of foreign intelligence activities might raise significant constitutional questions. Senate Foreign Intelligence Hearings at 457-58. Professor Bork also took pains to note, however, that carefully drawn reporting and oversight requirements were both desirable and constitutional. *Id.* at 463.

In his Senate testimony, as well as in testimony before the House on a related bill, Professor Bork also argued that a serious constitutional question might arise from the imposition of a warrant requirement on the President in his conduct of foreign relations activities. See Senate Foreign Intelligence hearings at 461-62; *Foreign Intelligence Surveillance Act*, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, 95th Cong., 2d Sess. 134-35 (1978). Professor Bork's position was supported by the opinions of at least two Federal appeals courts, see, e.g., *United States v. Butenko*, 494 F.2d 593 (3rd Cir.), cert. denied, 419 U.S. 881 (1974); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970). Moreover, every President, beginning with Franklin D. Roosevelt, had claimed the authority to conduct foreign intelligence activities without a court order. In his testimony before this Committee, Judge Bork recounted the positions he had taken on this matter, and noted that the position he had taken on warrantless foreign intelligence surveillance was a description of "the way the law stood at the time I was saying that." Professor Bork's views on this matter were also consistent with Justice Powell's opinion for the Court in *United States v. United States District Court*, 407 U.S. 297 (1973). Although that case held that warrants were required in the context of domestic intelligence gathering, Justice Powell's opinion expressly reserved the question of foreign activities. *Id.* at 308.

By contrast, drawing on examples of operational decisions from World War II, Professor Bork expressed doubt as to whether Congress could "have ordered the Doolittle raid on Tokyo, directed that France be invaded from the south rather than through Normandy,

or directed the airborne troops at Bastogne to surrender during the Battle of the Bulge." Senate Foreign Intelligence Hearings, 1978, at 460.

Judge Bork reiterated his understanding of this basic dichotomy during his testimony before this Committee. Judge Bork gave the following concrete example of his expansive view of congressional powers in the sphere of war and peace: "As far as Vietnam is concerned, Congress could have cut off the funds and ended that war, whenever. That would have been entirely constitutional." He reiterated that "if Congress had told [the President] to surrender the airborne troops at Bastogne, I think that is a decision for the President, not for the Congress. That is a tactical decision, and he is Commander-in-Chief." He also stated that "there is a vast spectrum between the ultimate strategic questions of war or peace and tactical decisions in the field, and it may be that *some constructions* of the War Powers Act might get Congress into clearly tactical decisions, but I am not sure about that. I have not looked at that for a long time." (Emphasis added.) Others have had considerably stronger things to say about the War Powers Resolution. For example, during the debates, Senator Sam Ervin stated: "The bill is not only unconstitutional, but is also impractical of operation. In short, it is an absurdity." See Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 Wm. & Mary L. Rev. 823, 842 (1975). Judge Bork asserted, however, that, if the War Powers Resolution were to come before him, he "would construe the Act to save its constitutionality as a judge should." To the extent that, as a professor, Judge Bork had called the War Powers Resolution "unworkable," he noted in his testimony that "[t]hese are policy questions, and they are not for me [as a judge to decide]."

In sum, Judge Bork's philosophy of the allocation of war making powers is plainly neither pro-executive or pro-legislative; rather, it seeks to strike the balance found in the Constitution.

EXECUTIVE PRIVILEGE

A question was raised about Judge Bork's view of executive privilege, as expressed in his dissenting opinion in *Wolfe v. Department of Health and Human Services*, 815 F.2d 1527 (1987), a Freedom of Information Act case involving the requested disclosure of documents tracing the status of proposed regulations in the decision-making process. The majority opinion ordered disclosure of the documents under the statute, and, in a short passage, dismissed the government's claim that a constitutional privilege shielded the deliberative documents from disclosure. Judge Bork's dissenting opinion argued that the Freedom of Information Act did not require disclosure, and would not therefore have decided the constitutional question. However, although he was reluctant to reach this "complex and important issue," he added a few words to address the way the majority "casually dispose[d] of the important issue." *Id.* at 1527. He stated that, in order to determine whether executive privilege was available, he would remand in the case to the district court to determine whether the communications at issue were in pursuance of the function of *directly* advising and assisting the

President. This is an exceedingly narrow view of executive that would exclude from protection the confidential deliberative processes of most of the executive branch. It is a view significantly less hospitable to the executive than that currently espoused by the Department of Justice. It is by no means a "pro-executive" view.

Judge Bork's dissent in *Wolfe* also articulated a broader theory of governmental immunity that would expansively protect from disclosure the internal deliberations of all three branches. He stated:

Although the constitutional defense to . . . disclosure here asserted by the government is referred to as "executive privilege," nothing about the privilege is distinctly executive. Rather, the privilege is an attribute of the duties delegated to each of the branches by the Constitution. Neither Congress nor the courts, any more than the executive, could be constitutionally forced by a coordinate branch to reveal deliberations for which confidentiality is required.

815 F.2d at 1539. Thus, with respect to the privilege against disclosure of confidential deliberations, it is plain that Judge Bork's position is not pro-executive, but seeks to preserve the effective functioning of all branches of the government.

THE AGNEW CASE

While he was Solicitor General, Judge Bork was asked by Attorney General Richardson to review Federal criminal proceedings being considered against incumbent Vice President Spiro T. Agnew. Solicitor General Bork concluded that the evidence warranted indictment of the Vice President and that, contrary to arguments advanced by Vice President Agnew's lawyer, a sitting Vice President could be indicted before being impeached by Congress. Attorney General Richardson and Solicitor General Bork went to the White House to persuade the White House staff to permit the Department of Justice to indict the Vice President. When they encountered resistance from the staff, they went to see the President and persuaded him that there was only one possible course of action. President Nixon agreed to let them indict Mr. Agnew.

Attorney General Richardson, in an unusual move, asked the Solicitor General to draft a pleading for the trial court. The brief filed argued that civil officers of the United States were not generally immune from prosecution, and that the Vice President was no exception. Within several days of its having been filed, the Vice President resigned from office and pleaded *nolo contendere* to the charges. In his testimony before this Committee, former Attorney General Richardson commented that he had "learned to have great respect for [Robert Bork] as a lawyer, especially when dealing with constitutional issues," during the time Attorney General Richardson was working "very closely" with Solicitor General Bork on "the issues presented by the Agnew case." Former Attorney General Richardson added that he regarded the Agnew case as a "substantially more difficult problem than anything [he] had had to deal with in Watergate." *Id.*

POCKET VETO

The fact that Judge Bork has no pro-executive bias is conclusively demonstrated by the role he played as Solicitor General in persuading the President not to use the pocket veto when Congress appoints an agent to receive messages during intrasession and intersession recesses and adjournments. Over the opposition of others in the Ford administration, who were urging an aggressive use of the pocket veto, which cannot be overridden by Congress, Solicitor General Bork used his institutional authority as the government's chief advocate in the Supreme Court to defeat a policy that he believed was an unconstitutional usurpation of Congress' power to override a presidential veto.

In *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) for example, the United States Court of Appeals for the District of Columbia Circuit held that it was unconstitutional to use a pocket veto during a short intrasession recess when an agent of the originating House of Congress has been appointed to accept veto messages. Solicitor General Bork refused to seek *certiorari* to obtain review of this unfavorable ruling because he thought the appeals courts had correctly decided the case.

At the advice of others in the Justice Department and Office of Management and Budget, the Ford White House then resorted to a mixed form of veto during a longer recess than had been obtained in *Sampson*. This new form of veto was in substance a return veto—that is, the President returned the bill to the originating House with a message of disapproval—but, in the veto message, the White House claimed that it was preserving its claim to be able to use the pocket veto in those circumstances. This provoked a subsequent lawsuit. See *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976).

When the White House was attempting to determine how to handle the *Kennedy v. Jones* suit, Solicitor General Bork informed the Administration that he believed that it was unconstitutional to use the pocket veto accept at the final adjournment *sine die* of a Congress and that he would not argue any case in the Supreme Court defending the use of the pocket veto in other contexts; see also Memorandum to President Gerald R. Ford, from Attorney General Edward H. Levi, March 18, 1976 (Appendix A). The refusal of the Solicitor General to sign a brief or argue a case is a sign to the Supreme Court of his disagreement with the Administration's position and significantly harms the chances of success before the Supreme Court.

At the same time, Solicitor General Bork prepared for the Attorney General "a lengthy analysis of the constitutionality of the pocket veto and concluded *against the President*"; see also Memorandum to Attorney General Edward H. Levi, from Solicitor General Robert H. Bork, January 26, 1976 (Appendix B). Solicitor General Bork's analysis in this case was based on what he believed was the "original understanding" of the pocket veto clause. Attorney General Levi relied on this analysis in a memorandum to the President arguing for the abandonment of the pocket veto except at the end of a Congress, and he appended Solicitor General Bork's memorandum as the detailed legal basis for his conclusions; see also Memorandum to President Gerald Ford, from Attorney General

Edward H. Levi, Jan. 29, 1976 (Appendix C). Considerable infighting went on within the White House, but in the end the position of the Solicitor General and Attorney General prevailed, and a press release drafted by the Solicitor General's office was issued on April 13, 1976 indicating an abandonment of the challenged use of the pocket veto. The Washington Post wrote an editorial praising Solicitor General Bork and Attorney General Levi for the role that they played in getting the President to stop using the pocket veto. See *Vetoing the Pocket Veto*, Washington Post, Apr. 21, 1976, at A14.

Thus, *while he was a high official in the executive branch*, Robert H. Bork stood on principle and opposed the use of a presidential prerogative in circumstances that he believed were not intended by the Constitution. This clearly demonstrates that Judge Bork does not favor the executive, but is faithful to the meaning of the Constitution in the area of the separation of powers, as elsewhere.

PRECEDENT

Judge Bork's testimony, writings and speeches demonstrate a view of precedent that is in full accord with the dominant tradition in American jurisprudence. That tradition reflects a recognition that there will be occasions on which a reconsideration of precedent will be appropriate, but that respect for continuity and stability in the law require that overruling of prior decisions be done sparingly and cautiously.

Surveying the literature and the Supreme Court case law, one detects two distinct approaches to the role of precedent in constitutional cases. The first position is that precedent should be given no weight when the Supreme Court is convinced of prior error in interpreting the Constitution. The other, more conservative, position is that precedent must be given some, although not dispositive, effect in deciding whether to overrule a prior constitutional decision. Judge Bork has embraced the latter approach.

Justice William O. Douglas advocated a more liberal approach, arguing that *stare decisis* should be given virtually no weight in constitutional adjudication. Writing in 1949, Justice Douglas explained why:

[The judge] remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

(Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).)

The Supreme Court articulated a similar view 5 years earlier in *Smith v. Allright*, 321 U.S. 649 (1944), an 8-1 decision overruling *Grovey v. Townsend*, 295 U.S. 45 (1935), a unanimous decision handed down only 9 years earlier. The issue in these cases was the constitutionality of the white primary. *Grovey* had rejected the challenge, reasoning that to deny a vote in a primary was a mere refusal of party membership with which the State need have no

concern. The dissent in *Allright* took pains to point out that "[n]ot a fact differentiates [the prior] case from this except the names of the parties." Nevertheless, the majority felt no obligation to abide by *Grovey*, looking instead to the constitutional provisions dealing with the right to vote. Convinced of its prior error, the Court overruled *Grovey*, commenting on the role of precedent as follows:

In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day.

(321 U.S. at 665.)

Many judges and scholars, however, advocate a more cautious and restrained view, emphasizing the need for stability and continuity in the law. For example, while recognizing that "[a] reforming court must constantly overrule precedent," Professor Archibald Cox has attempted to formulate a greater role for precedent in constitutional adjudication:

In my view a clear-cut line of precedents, not shown to be logically inconsistent with a wider body of constitutional decisions, should be given great weight in a later case. I cannot measure the weight, but it should be so great—I think—as to outweigh the arguments for change unless one is pretty clear that the change is impelled by one of the deeper lasting currents of human thought that give direction to the law.

Judge Bork has repeatedly indicated his adherence to this latter view. He has stated that a court must always be prepared to reconsider prior decisions, but that a presumption exists in favor of stare decisis.

Regarding the propriety of a court overruling precedent when necessary, Judge Bork testified before the Committee:

Times come, of course, when even a venerable precedent can and should be overruled. The primary example of a proper overruling is *Brown v. Board of Education*, the case which outlawed racial segregation accomplished by government action. *Brown* overturned the rule of separate but equal laid down 58 years before in *Plessy v. Ferguson*. Yet *Brown*, delivered with the authority of a unanimous Court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law.

This is a position which Judge Bork has maintained throughout his career. For example, in a 1968 article in *Fortune* magazine, he wrote:

The history of the Fourteenth Amendment, for example, does indicate a core value of racial equality that the Court

should elaborate into a clear principle and enforce against hostile official action. Thus the decision in *Brown v. Board of Education*, voiding public-school segregation, was surely correct.

(Accord *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).)

Nevertheless, Judge Bork has repeatedly stated that the mere fact that a judge regards a prior decision as incorrect is insufficient, standing alone, to justify its being overruled. Testifying at these hearings, he stated that: "overruling should be done sparingly and cautiously. Respect for precedent is a part of the great tradition of our law. . . ." Similarly, at this confirmation hearings in 1982, when he was nominated to his present position on the United States Court of Appeals for the District of Columbia Circuit, Judge Bork engaged in the following colloquy with Senator Baucus:

Senator BAUCUS. While you are here, though, and I have a chance to pick your brain a little, do you have any general guiding principles as to when a Supreme Court judge should adhere to the principle in looking at, revisiting Supreme Court issues?

Mr. BORK. Well, yes. I think it is a parallel to what Thayer said about the function of a judge when he is reviewing a legislative act for constitutionality. He said he really ought to be absolutely clear that it is unconstitutional before he strikes down the legislative act, if not absolutely clear, awfully clear.

I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

Senator BAUCUS. I appreciate that, Mr. Bork.

Throughout his writings, Judge Bork has emphasized that constitutional precedents cannot be lightly overturned. Citing the courts' broad interpretation of the commerce power, Judge Bork states:

There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.

A Talk With Judge Robert H. Bork, District Lawyer 29, 32 (May/June 1985). Judge Bork reiterated his concern the same year:

If the Justices have become convinced that a decision cannot be squared with the Constitution, they ought to

consider overruling it. But the Court should be careful. If a particular decision has become the basis for a large array of social and economic institutions, overruling it could be disastrous.

(*Robert Bork on Judicial Restraint*, Manhattan Report 14, 15 (1985).)

In addition to the decisions broadening the scope of the commerce power, Judge Bork cites the *Legal Tender Cases* as an example of a decision that, even if thought to be wrong, should not be overruled. In 1869, the Supreme Court, by a vote of 5-2, held beyond Congress' enumerated powers an Act making bills emitted on the credit of the United States—i.e., paper money—legal tender for the payment of public and private debts. See 75 U.S. 603. In 1871, by a vote of 5-4, the Court overruled the prior decision and held the Act a valid exercise of Congress' constitutional powers. See 79 U.S. 457. Madison's notes of the Constitutional Convention demonstrate that the Constitution was not intended to confer upon Congress the power to issue paper money as legal tender. See Dam, *The Legal Tender Cases*, 1981 Sup. Ct. Rev. 367. Nevertheless, Judge Bork's position is that if a majority of the Supreme Court today became convinced that the decision upholding legal tender was wrongly decided, the Court should not attempt to overrule that decision, given the attendant chaos and disruption of settled expectations that would follow. At these hearings, Judge Bork indicated several other areas of law, including the 1st Amendment, equal protection, and the incorporation of the bill of rights to the states, which he regards as too settled to be subjected to reconsideration by the Court. He said: "These are things of not only long standing but all kinds of things have grown up around them. Any judge understands that you don't tear those things up." Indeed, Judge Bork explained that it was particularly important that a judge who interprets the Constitution by reference to original understanding, even more than other judges, have respect for precedent: "... otherwise, he would be constantly trying to rip up the nation and its laws, and you can't do that."

Judge Bork was asked at the hearings which specific factors he would weigh in deciding whether a prior decision ought to be overruled. He noted at the outset that more is required than that the prior opinion simply be judged wrongly decided:

... a judge must have great respect for precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.

In determining whether a prior decision ought to be overruled, Judge Bork stated how he would proceed:

I think I would look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. And if it is wrongly decided—and you have to give respect to your predecessors' judgment on these matters—the presumption against overruling remains, because it may be that there

are private expectations built up on the basis of the prior decision. It may be that governmental and private institutions have grown up around that prior decision. There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine. And it is important that the law not be considered as shifting every time the personnel of the Supreme Court changes.

Finally, Judge Bork made a distinction at the hearings between precedent in the area of constitutional law and precedent in the area of statutory law. As he noted in his taped remarks at Canisius College in 1985: "... if you construe a statute incorrectly, the Congress can pass a law and correct you. If you construe the Constitution incorrectly, Congress is helpless." A tape of these remarks was played at the hearings in an effort to challenge Judge Bork's statement of his views of precedent. During the question and answer session following this address, in making the distinction between precedent in constitutional law and precedent in statutory law, Judge Bork stated, as he has repeatedly, that a court must always be willing to reexamine prior precedent. He neglected to add, as he always had before, that many areas of law are too settled to be overturned. Much was made of this single omission—as if Judge Bork were, in one question-and-answer session, repudiating all his previous (and subsequent) comments about precedent—but, as Judge Bork stated:

Before we get off that tape, Senator, I would like to say this: you have in your hands speech after speech and interview after interview where I have said some constitutional decisions are too embedded in the fabric of the nation to overturn.

This distinction echoes one made by Justice Brandeis more than 50 years ago. His is the leading statement of the rule, worthy of quotation in full:

Stare decisis is not, like the rule of *res judicata*, a universal, inexorable command. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-08 (1932).

It is important to emphasize that Judge Bork as indicating only that precedent in constitutional law is less binding than precedent in statutory law. In his remarks before and during his appearance before the Committee, he repeatedly identified several areas of constitutional law which he believes cannot now be overruled, regardless of whether a judge would have adopted their reasoning as an initial matter.

In sum, Judge Bork's views on precedent reflect the mainstream tradition in our jurisprudence—a tradition which recognizes the necessity, from time to time, of overruling prior decisions but erects a strong presumption against doing so.

ANTITRUST

The hearings affirmed that Judge Bork's academic writings on antitrust law are not only well within, but, in fact, define, the mainstream. Judge Bork's antitrust philosophy, which is most fully articulated in his book, *The Antitrust Paradox* (1978), holds that the antitrust laws were intended to enhance the welfare of consumers by rationally applying the principles of economics to maximize the output and minimize the price of goods and services. The Supreme Court has relied greatly on this theory in a process of rethinking the antitrust laws that began roughly ten years ago. Indeed, soon after *The Antitrust Paradox* was published, the Court, in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), cited it to support the holding that the purpose of antitrust is the promotion of consumer welfare. In all, Professor Bork's seminal work has been cited approvingly in no fewer than six majority opinions by such Justices as Brennan, (*Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484, 495 n.17 (1986).), Powell, (*Matsushita Elec. Indus. v. Zenith Radio, Co.*, 106 S. Ct. 1348 (1986).), Stevens, (*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985); *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 101 (1984).), and Chief Justice Burger, (*Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1978); *United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978).), as well as in Justice O'Connor's influential concurring opinion in *Jefferson Parish Hospital District No. 2 v. Hyde* 466 U.S. 2, (O'Connor, J., with whom Burger, C.J., Powell and Rehnquist, JJ., joined, concurring in the judgment), and Justice Blackmun's dissenting opinion in *National Society of Professional Engineers v. United States* (435 U.S. 679, 700 n* (Blackmun, J., with whom Rehnquist, J., joined, dissenting.)) Every Justice currently sitting on the Supreme Court has joined at least one opinion citing with approval *The Antitrust Paradox*.

Commenting on his book at the hearings, Judge Bork said:

My entire book, which was published in 1978, is premised on the questions of what best serves consumers, what best serves consumer welfare. I have not made a single argument in this book which is not based upon that.

Following Judge Bork's nomination to become an Associate Justice of the U.S. Supreme Court, moreover, 15 former chairmen of the antitrust section of the American Bar Association signed a letter asserting: "Fortunately, the mainstream view, which no one

has helped to promote more than Judge Bork, is that the proper antitrust policy is one that encourages strong private and government action to promote consumer welfare rather than unnecessary intervention to protect politically favored competitors." (U.S. News & World Report, Sept. 14, 1987, at 23). We have attached the full text of this letter as an appendix to this report (see appendix D).

During the hearings, several questions were posed as to whether Judge Bork's theory of antitrust did not in fact operate to the detriment of the average consumer, which presented a different approach from earlier criticisms that Judge Bork's theory of antitrust focused excessively on consumer welfare. The thrust of the criticism at the hearings was in relation to his theory that a manufacturer may in some instances enhance efficiency and thus consumer welfare by regulating the terms under which its distributors sell the manufacturers' product. Judge Bork argued that such limitations on the terms of resale, which are known as "vertical restraints," could in some cases enhance consumer welfare by inducing the sellers to provide certain services in connection with the sale of a manufacturer's products. Judge Bork's argument should assuage any concerns that his antitrust theories are anticonsumer, for, in *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), the Supreme Court expressly recognized and relied upon the efficiency-producing potential of a vertical restraint in upholding the legality of one that was imposed by a wholesaler upon its retail outlets. In so doing, moreover, Justice Powell's majority opinion cited an article by Robert Bork. See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 75 Yale L.J. 373 (1966).

A panel of renowned antitrust scholars and practitioners confirmed that Judge Bork's antitrust scholarship has been extremely well-respected, highly influential, and well within the mainstream. For example, Harvard Law Professor Philip Areeda, whose treatise on antitrust is regarded by many as one of the definitive works in the field, stated that Judge Bork "is committed to the mainstream antitrust values of protecting consumers." Donald Baker, a partner in a major law firm, a former professor of law, and former Assistant Attorney General for Antitrust, argued forcefully that "Judge Bork's elevation to the Supreme Court would promote the cause of effective antitrust law." Significantly, Mr. Baker commented: "Professor Bork has come down squarely on the side of 'competitive efficiency.' So has the modern Supreme Court." *Id.* at 294. James Halverson, a partner in a major law firm and a former Chairman of the ABA Antitrust Section, stated: "[I]t is difficult for me to comprehend how knowledgeable people could take issue with Judge Bork's significant contributions to the improvement of our understanding of how antitrust laws were originally intended to be enforced in the interest of enhancing consumer welfare. Judge Bork's writings within the antitrust area have been among the most influential and scholarly ever produced." *Id.* at 296-97. Professor Thomas Kauper of the University of Michigan Law School, a former Assistant Attorney General for Antitrust, similarly remarked:

[T]he Supreme Court, in a series of decisions beginning in 1977, has apparently agreed with Judge Bork's . . . proposition [that the antitrust laws are intended to maximize consumer welfare]. So, too, the Court in the past decade has developed substantial antitrust doctrine in accord with an economic analysis that focussed on price and output effects, as Judge Bork's writings have urged. Unless the Supreme Court in the past decade has itself been outside the mainstream of antitrust thinking, Judge Bork is clearly within it.

His testimony persuasively, reinforces the conclusion of the letter signed by 15 past chairmen of the ABA Antitrust Section stating that Judge Bork's views are not only within the mainstream, but have greatly helped to define it.

Finally, since he has been on the bench, Judge Bork has heard only one major antitrust case, in which he held that a group of Allied Van Lines companies had too small a share of the interstate furniture moving market to harm competitors and that their efforts to produce effective coordination could be justified as increasing efficiency and helping consumers. The opinion was a scholarly synthesis of seemingly conflicting lines of Supreme Court precedent, carefully tracing the history of antitrust law in the process. Judge Bork's opinion was joined in whole by Judge Ruth Bader Ginsburg and in large part by Judge Wald. The parties asked the Supreme Court to review the case, but *certiorari* was denied. (*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. 1986), *cert. denied*, 107 S. Ct. 880 (1987).)¹

In sum, Judge Bork's scholarly record in antitrust has largely come to define the mainstream in that area, and his judicial record in antitrust, although sparse, is nonetheless distinguished.

CRIMINAL LAW ISSUES

Nearly one-third of the Supreme Court's caseload involves criminal justice—the largest single category of cases heard by the Court. And criminal justice issues are of vital, immediate concern to all Americans, especially the poor, the aged, women, and minority groups. These Americans are disproportionately victimized by criminals, and they are the most directly affected by, and concerned with, fair and effective criminal justice. When our criminal justice system fails—when hardened criminals are set free to prey on the public again—it is these disadvantaged Americans who are the first to suffer. As was stated during the hearings:

Judge Bork's firm approach to criminal law is a matter that should be of interest to the civil rights community, for crime preys more savagely on the poor of our major urban centers. Judges who show excessive concern for the rights of criminals, and not enough for the victims of crime, do a disservice to all Americans, but particularly to the urban

¹ Judge Bork's other antitrust cases, *FTC v. PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986), and *Neumann v. Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir. 1986), involved more routine, procedural issues.

poor who bear the brunt of the enormous cost of rampant crime in our society.

It is therefore imperative that the Senate give the closest attention to a nominee's views of criminal justice. This is particularly true of this nomination, because retiring Justice Lewis Powell repeatedly provided the crucial fifth vote on such important criminal law issues as the constitutionality of the death penalty. In fact, Justice Powell's vote was decisive throughout the entire 15-year trend away from Warren Court activism and toward a balanced approach rooted in the text of the Constitution.

It is ironic that those who employ the so-called balance issue against Judge Bork have chosen not to discuss the narrow margins by which important criminal law issues have been decided in the Supreme Court. Last term, for example, the constitutionality of capital punishment for especially heinous murders was sustained by a single vote against a challenge brought by a number of the organizations now opposing Judge Bork's nomination. The decisive vote to sustain was that of retiring Justice Lewis Powell. It seems obvious that these organizations oppose Judge Bork's nomination because on this and many other criminal law issues they seek to reverse settled decisions of the Court and impose their own political agenda. They hope to prevent the confirmation of any judge who would continue Justice Powell's conservative criminal jurisprudence.

Judge Bork's record as a scholar, Solicitor General, and jurist shows that he would follow the conservative criminal jurisprudence of Justice Powell. As Solicitor General of the United States, Judge Bork argued the trilogy of cases which established that capital punishment was not per se unconstitutional—decisions authored and joined by Justice Powell. As a scholar, Judge Bork has forcefully argued that the repeated references to capital punishment in the text of the Constitution refute the claims made by leftist academics and activist judges that the death penalty is unconstitutional. And both as Judge and as Solicitor General, Judge Bork has shared Justice Powell's insistence on the truth-seeking function of criminal trials.

By the same token, Judge Bork has repeatedly shown that he shares Justice Powell's insistence on providing criminal defendants and suspects with the full protections of the Constitution. For example, in *United States v. Brown* Judge Bork voted to overturn the convictions of members of the "Black Hebrews" sect because the trial court, by dismissing a juror, had violated the defendants' right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most expensive trial ever held in a District Court here shows that he will scrupulously follow the mandate of the Constitution to protect defendants' rights.

At the hearings, Judge Bork enunciated a balanced approach:

I think a judge has two responsibilities. One is to ensure that any accused gets a fair, completely fair trial, so that he is not prejudiced in any way. But the other responsibility is not to elaborate legal doctrine so that the appeal be-

comes a game, and somebody gets off on a technicality, which has nothing to do with fairness.

This balanced and fairminded approach, rooted in the Constitution, explains why groups representing over 400,000 law enforcement professionals have endorsed Judge Bork's nomination, including the National Law Enforcement Council, the National District Attorneys' Association, the International Association of Chiefs of Police, the National Sheriffs' Association, the National Association of Police Organizations, the Major City Chiefs association, the National Troopers Coalition, the International Narcotics Enforcement Officers Association, and the Fraternal Order of Police. The F.O.P.'s resolution on the nomination sums it up: "It is in the best interests of the citizens of the United States and all law enforcement officers that Judge Bork be confirmed to the Supreme Court."

WATERGATE

The Committee also heard from Judge Bork and others concerning the events of October 20, 1973, and the period thereafter. Judge Bork's execution of President Nixon's directive to dismiss Watergate Special Prosecutor Archibald Cox and his efforts to ensure that the Watergate investigation continued without disruption, delay or interference had been the subject of extensive testimony before this Committee and Judiciary Committee of the House of Representatives in November 1973, as well as during this Committee's hearings in 1982 which preceded the unanimous confirmation of Judge Bork's appointment to the Court of Appeals. As with those previous examinations of Judge Bork's conduct in the so-called "Saturday Night Massacre" and its aftermath, the hearings confirmed the reasonableness of Judge Bork's actions throughout the episode and highlighted his important contributions to the continuation and ultimate success of the Watergate investigation.

Despite the depth in which the events of October 20, 1973, had been explored in the intervening 14 years, it was apparent from news reports before these hearings that certain of Judge Bork's opponents would attempt to draw the nominee's integrity into question through references to the "Saturday Night Massacre." Such an attempt was made during the American Bar Association's deliberations, with a notable lack of success, as reported to the Committee by Judge Harold Tyler. During these hearings, the dismissal of Archibald Cox was largely a non-issue, with only two members of the Committee—both avowed opponents of the nomination—evincing any inclination to rehash those events. Judge Bork's testimony was corroborated on all relevant points by former Attorney General Elliot Richardson, who was present when the decision was made to carry out the President's order on October 23, 1973, and by Philip A. Lacovara, Counsel to Special Prosecutor Archibald Cox, who submitted a detailed statement to the Committee concerning the events in the aftermath of the Cox dismissal (see appendix E).

As he has testified previously, Judge Bork described for the Committee the circumstances which resulted in his decision to carry out the presidential order to discharge Cox as Special Prosecutor. It was clear to then-Attorney General Elliot Richardson, who met with the President at the White House, that Cox's dismissal was

inevitable. Neither Richardson nor Judge Bork doubted that the President could lawfully order the discharge of Cox, who was an employee of the executive branch. Richardson previously had received an opinion of counsel that the President had such legal authority. The issue, therefore, was not *whether* Cox would be fired, but merely *who* would carry out the order. Unlike Richardson, who was personally bound by a congressional pledge not to dismiss Cox except for extraordinary improprieties, and Deputy Attorney General William Ruckelshaus, who regarded himself as similarly bound, Judge Bork—then the Solicitor General and third and last in the Justice Department's line of succession—has no such personal obligation. He thus could carry out the President's order.

The decision by Judge Bork to execute the presidential directive to dismiss Cox was made with an understanding that additional resignations and upheaval likely would follow if he, too refused the President's order and resigned. Judge Bork testified:

My first thought to do it was the fact that we were in enormous governmental crisis. I don't know if everybody remembers . . . the sense of panic and emotion and crisis that was in the air. It was clear . . . from my conversations with Mr. Richardson and Mr. Ruckelshaus that there was no doubt that Archibald Cox was going to be fired by the White House in one form or another. The only question as how much bloodshed there was in various institutions before that happened.

Judge Bork understood that his action would be enormously unpopular, but he regarded it as clearly necessary in order to alleviate a serious governmental crisis. Forced to make a decision quickly, he acted courageously and selflessly. Although he was inclined initially to leave the government after doing so, Judge Bork was urged not to resign by Richardson and Ruckelshaus, who regarded his remaining Acting Attorney General as crucial in order to provide leadership and continuity for the Justice Department during a critical time. Recognizing the importance of his position, Judge Bork was determined to provide the necessary leadership.

Judge Bork's decisions to remain Acting Attorney General, and execution of the Cox dismissal order, for the purpose of keeping the Watergate investigation on track was corroborated by then-Attorney General Elliot Richardson. As the senior Justice Department official most knowledgeable about the impact of these events on the Watergate probe, Richardson's concurrence in Judge Bork's course of action was highly significant. At the hearings, Richardson testified:

I believed that the President would accomplish the firing in one way or another. I believed that he had the legal right to do so. I believed that Bork was not personally subject to the same commitments [I had made to Cox and the Senate Judiciary Committee], and was thus personally free to go forward with this action, and that his doing so, in the circumstances, was in the public interest.

I was concerned that if he did not, as I said, a chain reaction would follow, meaning that if he resigned, the domi-

noes could fall indefinitely, far down the line, leaving the Department without a strong and adequately qualified leader.

That was a very practical concern. We had a situation in which not only Ruckelshaus and I, but all my top staff, were picking up and leaving.

The question really, as a practical matter was, how do you maintain the continuity and integrity of the investigation in these circumstances.

Richardson made it clear that on October 20, 1973, neither he nor Judge Bork regarded the order to dismiss Cox as part of an effort to cover up presidential wrongdoing. Having participated in the negotiations between Cox and the White House concerning the special prosecutor's demand for access to subpoenaed tapes of presidential conversations, Richardson believed on October 20, 1973, that the compromise proposal advanced by President Nixon had been offered in good faith and that the decision to dismiss Cox after his rejection of the proposal "could be accounted for without attributing bad faith to the President." Richardson testified that it was "not until many months later that [he] came to the conclusion that the President's order was part of an effort to derail the investigation."

When viewed with the advantage of hindsight and the knowledge of Nixon's culpability that came months later, the dismissal of Cox may be seen as part of a presidential effort to obstruct justice. Two former members of the Watergate Special Prosecution Force, Henry Ruth and George Frampton, so portrayed it in their testimony before the Committee. Significantly, however, Ruth reiterated during his testimony that Judge Bork "acted honorably" and with "good intention" in his conduct during the so-called "Saturday Night Massacre." Philip Lacovara, Archibald Cox's Counsel on the Watergate Special Prosecution Force, submitted a statement to the Committee in which he noted his personal disagreement with the decision to dismiss Cox but stated that he is "satisfied that [Judge Bork] acted for what were reasoned and reasonable motives and that his conduct was in all respect honorable." The only witness actually involved in the decision to dismiss Cox and the events leading up to that dismissal, former Attorney General Richardson, testified that Judge Bork's actions were in the best interest of the Nation.

During the course of the hearings there were those who referred to the vacated District Court opinion in the *Nader v. Bork* case 366 F. Supp. 104 (D.D.C. 1973), as support for the allegation that Judge Bork acted "illegally" in dismissing Archibald Cox pursuant to the President's order. The opinion of Judge Gerhard Gesell in that case was never subject to appellate review because the plaintiffs chose to seek dismissal of the case rather than attempt to sustain Judge Gesell's strained decision in the Court of Appeals. The Court of Appeals accordingly ordered Judge Gesell to vacate his ruling, and he did so, thereby rendering it of no legal consequence whatsoever.

Although the absence of valid legal authority to support the assertion did not deter some from continuing to characterize the Cox dismissal as "illegal", the hearings confirmed that the President

had the lawful authority to dismiss Cox, that his directive to that effect was carried out with an honest and reasonable belief in the legality of the action, and that any defect in the validity of the discharge on October 20, 1973, was remedied on the first business day thereafter when the regulations governing the Special Prosecutor were explicitly and formally revoked. No witness challenged any of these facts during the hearings.

Archibald Cox testified before Congress in November 1973, regarding the President's authority under the law to order his discharge:

I think the President had the power to instruct the Attorney General to dismiss me, and that the suggestion made yesterday that he did was correct, and I don't question that. (Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 51 (1973) ("1973 Hearings").

The timing of the explicit rescission of the Special Prosecutor regulations was, in Cox's view, at most a "technical defect". He did not participate in the *Nader v. Bork* case and stated during his congressional testimony that he "wish[ed] the suit hadn't been filed. Mr. Cox's own opinion of the lawfulness of his discharge was simply ignored by those who attempted to make an issue of the Cox dismissal and label it as an "illegal" act.

Judge Bork and former Attorney General Richardson explained during their testimony that neither had any doubt on October 20, 1973, that the President could lawfully direct the dismissal of Special Prosecutor Cox. As Judge Bork stated at his hearing:

The fact is none of us thought that that regulation was a bar to a presidential order . . . We assumed the President could do this over an Attorney General's regulation. That is what we thought at the time. (Transcript, September 16, 1987 at 32).

The explicit presidential directive to the Acting Attorney General effectively rescinded the Justice Department regulations appointing Cox, in Judge Bork's view, and no existing court decision holds to the contrary. The Supreme Court's ruling in *United States v. Nixon*, issued 9 months after the Cox discharge, held that jurisdiction of the Special Prosecutor could be premised upon extant Department regulations but did not address the impact of a written presidential directive upon the validity of those regulations.

Even if the presidential directive did not, as Judge Bork reasonably believed, effectively rescind the Special Prosecutor's charter, the defect was completely cured some 60 hours later when, on the first business day after the President's order, he explicitly and formally revoked the regulations. At most, then, the issue is one of the technical validity of the discharge during the 60-hour period. Given the criticalness of the situation that existed on October 20, 1973, and the unanimous view at the time that the President's order was a lawful one, it is apparent that Judge Bork committed no "Illegal" act and that the timing of formal revocation of the regulations, as Archibald Cox stated, was a "technical defect." Richardson testified, "very inconsequential in light of the circumstances

as a whole." The frequent reference during these hearings to the "illegality" of the Cox dismissal, therefore, were unwarranted and grossly misleading.

The actions of Judge Bork in the wake of the Cox dismissal also were discussed during the hearings, and it again was shown that his leadership was indispensable in holding the Special Prosecution Force together and ensuring that the Watergate investigations continued without interruption. The testimony confirmed the accuracy of the Report of the Watergate Special Prosecution Force, which in relevant part stated:

The "Saturday Night Massacre" did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House.

In his statement submitted for the record, Mr. Lacovara recounted that Judge Bork had assured him on the evening of Saturday, October 20, that he wanted the staff assembled by Archibald Cox to remain intact and to continue their investigations as Justice Department employees. The same message was conveyed by Judge Bork and Henry Petersen, Assistant Attorney General for the Department's Criminal Division, at a meeting with Lacovara and Deputy Special Prosecutor Henry Ruth on Monday, October 22, and at a meeting with other members of the Watergate Special Prosecution Force on Tuesday, October 23. Although Judge Bork was obliged by an order of the President to "take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force," Bork was so directed in President Nixon's letter to him dated October 20, 1973 (see appendix F). On October 23, 1973, the first business day after issuance of the presidential directive, the Acting Attorney General issued an order formally abolishing the Office of Watergate Special Prosecution Force. The Office was formally reinstated upon the appointment of Leon Jaworski as special prosecutor. He construed that order narrowly so as to require abolition of the Office of Watergate Special Prosecutor only in a formal sense while permitting him to retain the members of the Special Prosecution Force as an effectively independent unit functioning as before under the leadership of Mr. Ruth and Mr. Lacovara.

Although some of Judge Bork's opponents have suggested that his actions to preserve the integrity and independence of the Watergate investigation were merely a reaction of the "firestorm" of public protest that built after the Cox dismissal, such allegations are belied completely by Judge Bork's prompt and vigorous efforts to convince the Special Prosecution Force members to stay on and continue their investigations with his support. Indeed, Mr. Lacovara's statement to the Committee expressly rejected as "unfair and inaccurate" the suggestion that Judge Bork "was only willing to cooperate with the Watergate investigations after he detected

the so-called 'fire storm' . . ." Judge Bork testified that he "understood from the beginning that [his] moral and professional life were on the line if something happened to those investigations and prosecutions, and that is why [he] was adamant" that the Special Prosecution Force lawyers should continue their work.

Mr. Lacovara also made clear the significant consequences that flowed from Judge Bork's efforts to keep the Special Prosecution Force intact and functioning after Cox's dismissal. Had Judge Bork not done so, according to Mr. Lacovara, "there would have been substantial and perhaps irreparable obstruction of the ongoing criminal investigations." Mr. Lacovara's statement refuted the suggestion that Judge Bork's actions in this regard were inconsequential because "there [were] plenty of lawyers around" who could have taken over the investigation. This suggestion illustrates the tendency of Judge Bork's critics to discount or disregard altogether his important efforts to preserve the integrity of the Watergate probe.

Two former members of the Watergate Speciate Prosecution Force, Henry Ruth and George Frampton, confirmed the importance of Cox's staff in continuing the Watergate investigation after Cox's discharge but dismissed Judge Bork's role in the staff's decision to stay as "irrelevant." Although each sought repeatedly during his testimony to belittle the significance of the steps taken by Judge Bork to see that the team assembled by Cox remained intact, neither Mr. Ruth nor Mr. Frampton challenged the factual account of those steps as outlined in detail in Mr. Lacovara's statement to the Committee, nor did either suggest any additional steps that should have been taken by Judge Bork. Mr. Ruth's testimony was noteworthy for its sharp divergence in tone, if not substance, from his earlier statement, quoted in the *Los Angeles Times* (July 2, 1987), that "[Bork] clearly . . . did not march in lockstep with the White House concept to abolish us and make our lawyers part of the Justice Department." The suggestion by Mr. Ruth that Judge Bork had attempted to "rewrite history" by recalling his efforts to keep the Special Prosecution Force intact thus was not only unsupported in the record but was rebutted completely by Mr. Lacovara's detailed statement to the Committee and by Mr. Ruth's own previously published remark, which he acknowledged as accurate during his testimony.

Judge Bork's significant role in the appointment of a second special prosecutor also was discussed during the hearings. As he stated during his testimony before Congress in late 1973, Judge Bork testified that his initial belief that the Watergate investigation could proceed independently under the leadership of Ruth and Lacovara with Assistant Attorney General Petersen's general supervision changed as it became clear that public confidence in the integrity of the investigation would not be restored without appointment of a new special prosecutor.

The hearings established that Judge Bork undertook to identify an appropriate person for the special prosecutor post early during the week following the Cox discharge, and that he recommended appointment of a new special prosecutor to the President well before the decision to do so was made at the White House. Two witnesses, Professors Dallin Oaks and Thomas Kauper, gave unrebut-

ted testimony based on discussions each had with Judge Bork, probably on Monday, October 22, but certainly not later than Tuesday, October 23, that he was then searching for a qualified and respected person to replace Cox as special prosecutor. (Telegram from Thomas Kauper to Senator Biden) (see appendix G). A memorandum produce from the Nixon White House files confirmed that Judge Bork was privately urging the President to announce appointment of a new special prosecutor at least by Wednesday, October 24. (Memorandum from Leonard Garment to Alexander Haig dated October 24, 1973, with attached draft of presidential statement) (see appendix H).

Notwithstanding the uncontradicted testimonial and documentary evidence that Judge Bork undertook at an early stage to ensure appointment of a capable new special prosecutor, Mr. Ruth and Mr. Frampton made speculative and conclusory assertions to the contrary in their appearance before the Committee. Both men rested their conjecture upon the fact that Judge Bork did not disclose to them his efforts regarding a new special prosecutor, an action that hardly is surprising since Judge Bork could not have known whether those efforts would succeed until the President's assent finally was obtained.

As the testimony of Professor Oaks confirmed, Judge Bork focused early on Leon Jaworski as the primary choice to be the new special prosecutor. The former American Bar Association president enjoyed a widespread reputation for unimpeachable integrity, exceptional ability, and professional qualities deemed essential in order to inspire public confidence and ensure the success of the Watergate prosecutions. His appointment was announced by Judge Bork on November 1, 1973. Significantly, published accounts¹ several days earlier had described an apparent disagreement between the White House and the Acting Attorney General over the scope of the new special prosecutor's charter (see appendix I). Although President Nixon indicated at an October 26 press conference that the new prosecutor would not have access to presidential tapes and documents, Judge Bork insisted that the new special prosecutor's charter must be as broad as Cox' had been, including explicit assurances of the right to seek White House tapes and documents in court. Jaworski would not accept the position without such assurances, and the White House acceded prior to the November 1 announcement of his appointment.

The hearings left no doubt that, that by keeping the Special Prosecution Force intact in the wake of Cox' dismissal and by ensuring the appointment of a capable new special prosecutor with full guarantees of independence, Judge Bork made a highly significant contribution to the ultimate success of the Watergate investigations and prosecutions. In Mr. Lacovara's detailed statement to the Committee, he described a series of actions by Judge Bork that were supportive of the Special Prosecution Force's efforts to protect and advance the investigation in the aftermath of Cox's discharge, including his concurrence in placing the investigative files under court protection. The divergence between Mr. Lacovara's recollec-

¹ *New York Times*, October 29, 1973 (entitled "Nixon and Bork Split on Prosecutors' Role"); *New York Times*, October 28, 1973; *Washington Post*, October 31, 1973.

tion of events and the characterization given the same events by Mr. Ruth was striking. For example, Mr. Ruth cited the absence of Bork's name on the motion for a protective order as an indication of "how we felt about Mr. Bork at the time." In contrast, Mr. Lacovora cited Judge Bork's support for the protective order as evidence of the reliability of his pledge that the investigation would go forward without interference. Additionally, Judge Bork's reliance upon Special Prosecution Force attorneys to represent the Government at the critical October 23 hearing before Judge John Sirica concerning the subpoenaed White House tapes. Thereafter, Judge Bork approved a Special Prosecution Force request that a renewed demand for relevant presidential documents be communicated to the White House. The testimony at the hearings established that at no time was any request made by the Watergate Special Prosecution Force ever denied by Judge Bork or Mr. Petersen while they had responsibility for the Watergate investigations (see appendix J).

Finally, it should be noted that the efforts of Judge Bork's opponents to raise a credibility issue from insignificant differences in recollections of events after the Cox dismissal proved completely unavailing. Judge Bork testified that he assured Ruth and Lacovara on Monday, October 22, that he wanted the Watergate investigations to proceed as they had before Cox' dismissal and that he would tolerate no interference with the investigations so long as he remained Acting Attorney General. Both Mr. Lacovara and Henry Petersen, who was also present at the Oct. 22, meeting, submitted written statements to the Committee confirming that such was indeed the message conveyed by Judge Bork. While Judge Bork's recollection is that he mentioned his support for pursuit of the White House tapes at this meeting, the explicitness of the reference is unimportant. Mr. Lacovara stated that he "specifically recall[ed] the assurances that [Judge Bork] and Assistant Attorney General Petersen gave that the investigations would proceed on an objective, thorough and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation." Mr. Lacovara concluded that "the substance of Judge Bork's testimony . . . accurately reflects the tone and direction of his statements to the senior staff of the Watergate Special Prosecution Force in the hours and days after his dismissal of Special Prosecutor Archibald Cox."

Further confirmation of Judge Bork's consistent determination to support the Watergate Special Prosecution Force's efforts to obtain relevant presidential tapes and documents was provided by Henry Petersen and Judge Ralph Winter, who submitted statements to the Committee in which each recounted conversations he had with Judge Bork on Sunday, October 21. The statement submitted by Judge Ralph K. Winter was especially noteworthy as the discussion recounted by him included an explicit expression by Judge Bork that he necessarily would support efforts to obtain presidential tapes for evidentiary use if those carrying out the investigation regarded them as relevant (see appendix k). This expression came well before the so-called "firestorm" of public reaction to which some of Judge Bork's detractors have attributed his willingness to cooperate with the Watergate investigation.

The testimony of Messrs. Ruth and Frampton regarding Judge Bork's position on access to relevant White House tapes and documents seemed peculiar. After Mr. Ruth stressed the importance of the tape-recorded presidential conversations to the Watergate investigation, he was asked whether he agreed or disagreed with Mr. Lacovara's specific recollection that Judge Bork had assured the two of them on Monday, October 22, that the investigation should continue and "seek whatever evidence was relevant in determining guilt or innocence of the person under investigation." In response, Mr. Ruth did not challenge that such an assurance was given but contended that any assurance by Judge Bork was "irrelevant." At another point in his testimony, Mr. Ruth stated:

We were told by Mr. Bork and Mr. Petersen we could ask for tapes and indeed we renewed old requests that had been pending when [Archibald Cox] was fired, but we did not know when it came time to go to court what the Justice Department believed, i.e., Acting Attorney General Bork, about executive privilege and about whether the court should order the production of the tapes.

Mr. Ruth did not explain why, after Acting Attorney General Bork had authorized the Special Prosecution Force to seek a court order compelling the President to turn over tapes, it was pertinent what Bork's personal view was "about whether the court should order production of the tapes." The matter was for the courts to determine. It is doubtful that Special Prosecutor Cox ever knew Attorney General Richardson's personal view of the merits of the executive privilege dispute ultimately decided by the Supreme Court in *United States v. Nixon*, or that Special Prosecutor Jaworski knew Attorney General William Saxbe's opinion, but both were, like Bork's view, wholly irrelevant. In his testimony, Judge Bork stated:

I never took the position that the President had to hand over the evidence if he thought he had a legal right not to. I took the position that the Special Prosecution Force had a right to go to court to compel him to hand over the evidence, and, indeed, they did.

No one heretofore has suggested that Judge Bork could have, or should have, done more.

Throughout his testimony, Mr. Frampton asserted as fact matters that were neither within his actual knowledge nor supported in the record. For example, although he was not present at the Monday, October 22 meeting of Messrs. Bork, Petersen, Ruth and Lacovara, Mr. Frampton had no difficulty accusing Judge Bork of a "substantial reworking of the facts" in his description of that meeting and the assurances given there. Mr. Frampton was seemingly undaunted by the fact that a more senior member of the Special Prosecution Force, Mr. Lacovara—who, unlike Mr. Frampton, was present at this meeting—informed the Committee the substantive accuracy of Judge Bork's testimony. Mr. Frampton's willingness to impugn Judge Bork's integrity without factual support was evident in his description of the selection of Leon Jaworski as special prosecutor and his assertions concerning the nature of Attorney Gener-

al Richardson's commitments to this Committee regarding Special Prosecutor Cox.

The actions of Judge Bork during the critical events of October 1973 have withstood the most exacting kind of scrutiny over a 14-year period. The renewed inquiry into those actions by some during the recent hearings disclosed nothing that would impugn in any way Judge Bork's integrity, judgment or commitment to the rule of law. To the contrary, what emerged from this most recent examination of Judge Bork's role in the so-called "Saturday Night Massacre" is an even clearer picture of a courageous and principled man. He was forced suddenly into a crisis not of his making, and sought to serve the national interest. He succeeded in doing so in a way that has had a lasting and beneficial impact on this country. His exemplary performance during that controversy strengthens the case for his confirmation to the Nation's highest court.

JUDGE GORDON'S AUGUST 24 LETTER CONCERNING VANDER JAGT V. O'NEILL

The only allegation made throughout these lengthy hearings concerning Judge Bork's integrity was made by Senior District Judge James F. Gordon of the Western District of Kentucky. Judge Gordon wrote the Committee on August 24 (see appendix L), accusing Judge Bork of attempting surreptitiously to make the law of the case and of the circuit his own minority view in the case of *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983), without the assent or knowledge of the other two judges on the panel, Judge Gordon and Judge Roger Robb, now deceased. We regard Judge Gordon's allegations as patently misinformed and irrelevant to Judge Bork's qualifications, and we address it only because it was made by a Federal judge, and because it was raised several times during the hearings by members of the Committee.

In *Vander Jagt*, several Republican Members of the House of Representatives filed suit alleging that House committee assignments by the Democratic majority unlawfully diluted the political influence of the Republican Members and their constituents by assigning fewer seats on committees than their numbers would entitle them to proportionately. The district court dismissed the suit on the grounds that the challenge was precluded by the Speech or Debate Clause and the political question doctrine.

In his August 24 letter, Judge Gordon alleges, in essence, that after the three-judge panel had agreed, following argument, to dispose of the *Vander Jagt* appeal on one ground, Judge Bork, who had been assigned to write the opinion, decided unilaterally to change the rationale for the decision. Judge Bork allegedly attempted to do this, Judge Gordon suggests, by taking advantage of Judge Gordon's absence from Washington, DC, and Judge Robb's serious illness. Ultimately, Judge Gordon wrote the majority opinion of the court, in which Judge Robb joined, and Judge Bork wrote a concurring opinion.

Judge Bork explained his participation in that case during his testimony to our complete satisfaction. The Committee did provide the ABA with the letter, and asked the ABA to look into it. The ABA, according to the testimony of Judge Tyler, accepted Judge

Gordon's recollection of the events, and, without even getting Judge Bork's side of the story, determined that the matter was not serious enough to warrant further examination. Judge Tyler said that "we did not think that on balance this was serious, particularly since it happens once in a while in any event with the best of circumstances."

In order to respond more extensively to the Committee's questions, and undoubtedly in order to respond to the specific allegations made in Judge Gordon's letter, Judge Bork promised the Committee that he would submit a supplemental memorandum on this matter. Judge Bork submitted a detailed letter to the Committee on October 1, accompanied by affidavits of his two law clerks and Judge Robb's secretary, and contemporaneous correspondence between Judge Bork and Judges Gordon and Robb (See Appendix M). We believe that Judge Bork has demonstrated that there is absolutely nothing in his action in the *Vander Jagt* case that reflects adversely on his integrity.

We have also considered Judge Gordon's October 2 affidavit submitted in response to Judge Bork's testimony, and the affidavits of the law clerks to Judge Robb and Judge Gordon who handled the *Vander Jagt* case in the fall of 1982. We do not believe that there is anything in these affidavits that has not already been addressed and answered by Judge Bork in his testimony or in his October 1 letter to the Committee.

What Judge Tyler said "happens once in a while in any event with the best of circumstances" is that often a judge assigned to write an opinion for the court determines that the decision ought to be based on an additional or different rationale; sometimes the judge believes even the result should be different. This is a natural part of the judicial deliberative process, and this is what occurred in *Vander Jagt*: Judge Bork determined that a recent Supreme Court decision ought to be based on an additional or different rationale; sometimes the judge believes even the result should be different. This is a natural part of the judicial deliberative process, and this is what occurred in *Vander Jagt*: Judge Bork determined that a recent Supreme Court decision dictated that the *Vander Jagt* appeal be decided for the reason that the plaintiffs lacked standing to sue. (After argument, the three judges had agreed that they would assume plaintiffs had standing, but that they were not entitled to judicial relief on other grounds.) Judge Bork Visited presiding Judge Robb, they discussed Judge Bork's proposed change of rationale, and Judge Robb agreed to this change. This meeting is confirmed by Judge Bork's law clerk at the time of the meeting and by Judge Robb's personal secretary. (The October 2 affidavit of Judge Robb's law clerk states that the likelihood this law clerk did not begin his clerkship until after this meeting took place.) Judge Bork did not inform Judge Gordon of this change in rationale at the time, however, until after he sent Judge Gordon his proposed opinion in *Vander Jagt*.

This whole controversy erupted because, Judge Robb later did not recall this discussion with Judge Bork, and because Judge Gordon believes that Judge Bork never obtained Judge Robb's agreement to base the *Vander Jagt* decision on standing grounds. Judge Robb's law clerk's statement that it is "very unlikely" that

Judge Robb would have forgotten the substance of a conversation with Judge Bork concerning a change in the rationale in this case is contradicted by the recollection of Judge Robb's personal secretary of fourteen years. And Judge Bork's account of his meeting with Judge Robb in a memorandum to Judges Robb and Gordon dated October 8, 1982, states, "Judge Robb does not remember my conversation with him, *does not doubt it took place*, but is sure he must have misunderstood what I proposed." (Emphasis added.)

In his letter, Judge Gordon recalls that he was upset because Judge Bork failed separately to highlight his change of rationale, and because the standing rationale was contrary to what the panel had agreed at conference. Judge Gordon recalls that he called Judge Robb's chambers to find out if Judge Robb agreed with Judge Bork's view of the case, only to find Judge Robb in the hospital. Judge Gordon recalls that he was told by another judge that Judge Robb was upset by the turn of events and that Judge Robb wanted Judge Gordon to prepare a majority opinion in *Vander Jagt* relying on the *Riegle* case.

Judge Bork points out in his letter to the Committee, and in a contemporaneous memo to the other judges, that the equitable or remedial discretion rationale from *Riegle* was not discussed by the panel at conference. Although Judge Gordon and Judge Robb's law clerk recall otherwise, we believe that Judge Bork's recollection is supported by the record. Judge Robb's law clerk remembers that the *Vander Jagt* file he reviewed at the time indicated that the panel had agreed at conference that *Riegle* would be the basis for decision, but there is no documentary support for that statement; indeed, what documents we have reviewed back up Judge Bork's recollection. Moreover, Judge Gordon's clerk does not indicate in his affidavit that the *Riegle* equitable discretion rationale was brought up before Judge Robb was apprised of Judge Bork's draft opinion some months after the argument. Finally, Judge Gordon's recollection is not based on any contemporaneous documents; he admits that he has not reviewed any of his files on the *Vander Jagt* case.

Judge Gordon's August 24 letter implied that Judge Bork never obtained the concurrence of Judge Robb. Hence, the allegation that Judge Bork tried to pull a fast one; to sneak one by the other judges on the panel.

Judge Bork stated in his testimony and his letter that "it is simply preposterous to suggest that I could or would have attempted any such thing," and indeed it is. We have examined Judge Bork's letter, and the documents and affidavits he and others have furnished to the Committee. Judge Gordon's recollection of the events in his August 24 letter, which was accepted by the ABA, is faulty in several respects, a fact he now concedes. In sum, Judge Gordon's allegation of misconduct simply does not hold up: Judge Bork obtained the concurrence of Judge Robb, or reasonably believed that he had done so; explained to Judge Gordon the basis for a change in rationale, only a few days after he sent Judge Gordon his draft opinion; apologized several times for failing immediately to apprise Judge Gordon of his visit with Judge Robb and of the change in rationale; and was completely forthright with both judges concerning his views of the case. We agree with Judge Bork

that had Judge Gordon consulted the several memos Judge Bork wrote to Judge Gordon at the time of these events in 1982, this matter would have been no more than a little misunderstanding that occurred five years ago, and of no consequence to the fitness of Robert Bork for the Supreme Court.

We urge anyone continuing to harbor any doubts about the events in *Vander Jagt* to read Judge Bork's letter and the attached documents. Of particular interest is a letter written by Judge Gordon to Judge Bork on December 17, 1982, soon after the very events which Judge Gordon now recalls "shocked" him. Judge Gordon closed his letter to Judge Bork with the following: "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide season." As Judge Bork noted in his letter to the Committee:

This is hardly the sentiment of one who thinks an attempt to dupe him has just been made." Indeed, Judge Bork added, "I do not recall receiving any criticism from either Judge Robb or Judge Gordon at the time for changing my view of the case or even for failing to inform Judge Gordon right away of this change. . . . I do believe that my memorandum of September 24 and October 8, coming just days after I sent out my draft opinion, fully explained the circumstances to Judge Gordon, and I had no reason to doubt—in fact, I gave the matter no thought—that he was satisfied by my explanation until his letter to the Committee nearly five years later.

Indeed, in his October 2 affidavit Judge Gordon confirms that he never discussed these events with Judge Bork.

But there is a fundamental point that should not be lost in the sorting out of these five year old events, and that concerns the nature of the appellate decisionmaking process. It is surprising that Judge Gordon or anyone familiar with this process could believe that "there was a design and plan in Judge Bork's actions and activities." Judge Bork in his letter to the Committee states:

Of course, the very fact of sending a draft opinion to the other members of the panel, "for their review and comment," as I did in this case, is all that is often done by my court, and frankly, it is all that is or should be necessary. Not infrequently, I have received from other judges on my court draft opinions incorporating changes in rationale from that to which the panel had agreed at conference, and sometimes even a change in the result, without any separate explanation. And every opinion of the D.C. Circuit must circulate among all members of the court for a period of time before it may be issued. There is simply no possibility that any judge could change the law of the circuit surreptitiously. Even if that were possible, as it is not, the full court would simply grant the inevitable petition for rehearing *en banc* and put the law back in its prior position. Any judge who tried such a maneuver would cer-

tainly fail and would, moreover, forfeit forever the respect of his or her colleagues.

This explains why the ABA, *even accepting Judge Gordon's recollection of the events*, did not believe this amounted to anything. And we agree: Judge Bork's integrity has been wrongly impugned, but remains intact.

AMERICAN CYANAMID

Because it is an easy case to sensationalize, Judge Bork's opponents have made much of his opinion for a unanimous court, joined by then-Judge Scalia and Senior District Judge Williams, in *Oil, Chemical and Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). Judge Bork's opponents imply or even claim that this opinion shows that he is hostile to the protection of women, and specifically that he endorses an employer's policy requiring women to undergo sterilization as a condition of employment. Judge Bork's testimony and his opinion full rebut this demagoguery.

In 1978, American Cyanamid determined that it could not reduce lead levels in the lead pigment department of one of its plants to a level that would be safe for the fetuses of pregnant workers. Occupational Safety and Health Administration (OSHA) has taken the position that the Occupational Safety and Health Act requires employers to protect employees from harm to their fetuses, and the Court of Appeals for the District of Columbia Circuit has said that OSHA has authority to impose this requirement. *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1256 n. 96 (D.C. Cir.), cert. denied, 453 U.S. 913 (1981). Accordingly, the employer adopted a policy that only sterile women (or women past childbearing age) would be employed in this department. The employer informed the women who worked in the department of this policy, and of the availability of surgical sterilization as a way of complying with that policy. Faced with loss of their jobs or with transfer to lower-paying jobs, five of the women elected surgical sterilization in 1978. The employer closed the department in 1980.

Subsequently, the women and their union brought a title VII suit alleging that the sterilization policy constituted sex discrimination, and raising State law claims for intentional infliction of emotional harm and invasion of privacy. A Federal district court dismissed the State law claims as barred by the State statute of limitations, *Christman v. American Cyanamid Co.*, 578 F. Supp. 63 (N.D.W.Va. 1983), and the employer eventually settled the title VII suit with the women and their union.

Prior to this litigation, OSHA issued the employer a citation seeking a fine of \$10,000 on the grounds that the employer's policy exposed the women to "recognized hazards" in violation of the Act. The Occupational Safety and Health Review Commission rejected OSHA's contention that the employer's policy constituted a "hazard" within the meaning of this particular statute. The Secretary of Labor could have petitioned the Court of Appeals for review of the Commission's decision on behalf of OSHA. But the Secretary declined to do so, and the appeal was brought instead by the union as an intervenor. The Secretary of Labor did not file a brief.

When the case came before Judge Bork and his colleagues in 1983, the situation was this: the women had undergone sterilization some 5 years before, and there was no prospect that any other women would be subjected to that policy. The sterilized women had obtained a settlement of their title VII suit, thus obtaining some relief for the harm they had suffered. All that was at issue, from a practical standpoint, was whether the employer would have to pay a \$10,000 fine to the Federal Government. And all that was at issue from a legal standpoint was whether the employer's policy violated the OSH Act—not whether that policy violated other Federal or State law.

Judge Bork made plain at the outset of his unanimous opinion that the women were "faced with a distressing choice" between surgical sterilization and loss of their jobs or reduced pay. 741 F.2d at 445. Judge Bork noted that the "option of sterilization" was "one that the women might ultimately regret choosing," and observed that the employer's policy raised "moral issues of no small complexity." *Id.* But, Judge Bork explained, the court was not "free to make a legislative judgment." The issue was whether, under the circumstances presented, the employer's policy constituted a "hazard" within the meaning of the Act, and the court held that it did not.

In reaching that conclusion, Judge Bork acknowledged that the employer's "policy may be characterized as a 'hazard' to female employees who opted for sterilization in order to remain in the Inorganic Pigments Department, though it requires some stretching to call the offering of a choice a 'hazard' to the person who is given the choice." 741 F.2d at 448-449. To see whether this "stretching" of the statutory language was consistent with congressional intent, Judge Bork looked to analogous cases interpreting similar language, and to the legislative history of the Act, which indicated that Congress was concerned with protecting employees from air pollutants, industrial poisons, unsafe working conditions, and the like. Accordingly, he concluded, as had the Commission, that "recognized hazards" did not ordinarily include "a policy as contrasted with a physical condition of the workplace." *Id.* at 448.

Judge Bork could have rested the decision solely on this basis, but instead he narrowed the employer's victory considerably. He took judicial notice of the fact that an administrative law judge had found in a related proceeding that it was not economically feasible for the employer to lower the lead level to a certain point—a point that was well above the level that would endanger fetuses. Further, the Court of Appeals had ruled in *United Steelworkers*, 647 F.2d at 1295, that OSHA's proposed standard for the lead pigment industry—which would have covered the pigment department—was *technologically* infeasible. Yet that lead standard, although safe for employees, would still have resulted in lead levels that would be unsafe for fetuses. Therefore, it was apparent that the employer could not have reduced the lead level in the department to remove the threat to fetuses. On this basis, Judge Bork narrowed the court's ruling by stating that "[t]his case might be different if American Cyanamid had offered the choice of sterilization in an attempt to pass on to its employees the cost of maintain-

ing a circumambient lead concentration higher than that permitted by law." 741 F.2d at 450.

Moreover, it should be noted that the union made an important concession that reveals how narrow the dispute really was. In addition to the fact that "the company could not have been charged under the Act if it had accomplished [fetal protection] by discharging the women or by simply closing the Department," 741 F.2d at 449, counsel for the union conceded at oral argument that "there would have been no violation if the company had simply stated that 'only sterile women' would be employed in the Department because there would then have been no 'requirement' of sterilization." 741 F.2d at 450. As Judge Bork pointed out, this statement would also have given the women the option of sterilization, but without informing them that that option existed or how to pursue it. Thus, the union's concession supplied additional support for the court's decision, because "[i]t cannot be that the employer is better shielded from liability the less information it provides." *Id.* at 450.

In sum, it is indisputable that Judge Bork's unanimous opinion reflects sympathy for these women rather than hostility to them. As he wrote, "[t]he women involved in this matter were put to a most unhappy choice." 741 F.2d at 450. As he also noted, the employer's policy might violate federal labor law or title VII. *Id.* at 450 n. 1. In the case before the court, however, OSHA and the union had used the wrong law—seeking to expand the scope of a worker safety law to encompass employer policies rather than workplace hazards.

In his testimony before the Committee, Judge Bork made it as plain as is humanly possible that he appreciated the distressing predicament the women were confronted with. When he was first questioned about the case Judge Bork was asked how "you as a jurist could put women to the choice of work or be sterilized." Judge Bork responded to this question by explaining his reasoning, and he specifically noted that the company was confronted with "unattractive alternatives" and that the women were "faced with a distressing choice."

Judge Bork also pointed out that his colleagues, and the Review Commission, agreed with him and thus "did not think it was an outrageous case. And it was a matter of statutory interpretation, not a matter of constitutional law, and I suppose the five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them." Read in context, it is obvious that Judge Bork did not mean that the women were happy to have this "distressing choice." He meant that they apparently preferred that choice, at the time, to having no choice—to simply being fired or transferred to lower-paying jobs, as the employer could have done without violating the Act.

Nevertheless, an attempt was made to treat Bork's statement as proof of a malevolent hostility to women. One of the sterilized women, Ms. Betty Riggs, was solicited by her attorney in the *American Cyanamid* case to send in a telegram dictated by the attorney. When this telegram—in which Ms. Riggs expressed her disbelief that "Judge Bork thinks we were glad to have the choice of

getting sterilized or getting fired"—was read to Judge Bork, he made it unmistakably plain that he thought no such thing:

That was certainly a terrible thing for that lady, and it was certainly a terrible choice to have to make. Of course the only alternative was that she would have been discharged and had no choice.

I think it was a wrenching case, a wrenching decision for her, a wrenching decision for us, but the entire panel agreed on—the OSHA review commission agreed with us, agreed that it was not a violation of the hazardous conditions provision of the statute.

Further, in a colloquy with Senator Hatch the following day Judge Bork stated: "I would not want to be an official of that company trying to make that choice. I wouldn't want to be a worker faced with the choice. And fortunately, as judges, we were not faced with that choice." Judge Bork once again explained the reasoning that led the court to its unanimous conclusion, and concluded: "there is some thought that we approved a policy. We did not." No objective reader of Judge Bork's opinion, or of his testimony, could reasonably reach a contrary conclusion. Judge Bork's response regarding the inaccurate treatment of the *American Cyanamid* case is attached as appendix N.

CONCLUSION

As these views indicate, Judge Robert Bork is eminently qualified by ability, integrity, and experience to serve as Associate Justice of the Supreme Court. The failure of the Senate to confirm him will be a failure larger than simply denying one qualified nominee a place on the Court. It will be a disservice to the process by rewarding those who have turned the nominating process into a negative campaign of distortions; it will be a disservice to the judiciary of this country who should not be forced to endure such a politicized process; and most importantly, it will be a disservice to the American people, who not only will be denied the service of this intellect on the Court, but will also see the judiciary have its independence threatened by activist special interest groups.

MINORITY VIEWS OF MESSRS.

STROM THURMOND.
ORRIN G. HATCH.
ALAN K. SIMPSON.
CHARLES E. GRASSLEY.
GORDON J. HUMPHREY.

APPENDIX A

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, March 18, 1976.

MEMORANDUM FOR THE PRESIDENT

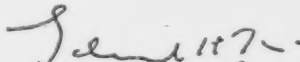
If there is to be a reconsideration of the pocket veto matter, I trust the following items will be taken into consideration:

1. Your decision in October, 1975 was that the President would only utilize the pocket veto following a sine die adjournment at the end of a Congress, provided the Congress had left authorized agents to accept return vetoes.
2. The position of the Administration on this matter was a factor in the decision not to seek certiorari in the case of Kennedy v. Sampson. The failure to seek certiorari was the subject of public criticism at that time, centering on the Solicitor General. It would be difficult for the Solicitor General, himself, although not his office, to take a different position in the present case of Kennedy v. Jones. This is a factor which does not increase the chance of success in the Supreme Court.
3. While I must recognize that there can be a difference of view, as to the probable outcome in the Supreme Court, between the position taken by the Attorney General and the Solicitor General, and the position now taken by the Counsel's Office, our view remains that the pocket veto during intra-session and inter-session recesses or adjournments cannot be justified as consistent with the provisions of the Constitution. We believe the result would be a loss in the courts which would not be helpful to the President's position. We believe this risk is a considerable one and hard to justify publicly as arising out of a desire to make the machinery of government work better.

- 2. -

4. The argument that the pocket veto is rooted in the early practice of long congressional absences, and that it must remain rigidly unaltered under changed conditions of rapid transportation and communication, does not seem to us likely to persuade the Court. This is particularly so since the last Supreme Court pronouncement on the topic, in the Wright case, casts doubt upon part of the basis for the old practice.

5. We are deeply troubled that the present case if continued will result in a ruling on standing which will be harmful, since this is the most appealing case to give standing to members of Congress. We believe this would be a most unfortunate development, coming at a time when in other types of situations the Supreme Court has begun to modify in a more conservative direction its position on standing. Thus we do not agree with the Counsel's Office that "concerned individuals can almost always be found to produce a test case."


Attorney General

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL,
Washington, DC, January 26, 1976.

January 26, 1976

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: SOLICITOR GENERAL *RHB*

RE: POCKET VETOES

Recommendations: (1) We recommend that the Attorney General be authorized to make the following public announcement on behalf of the President:

President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

(2) In accordance with the position expressed in the foregoing announcement, we further recommend that the Department of Justice be authorized to accept judgment in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.).

This recommendation is based upon our analysis of constitutional policy as well as our estimate of the likely outcome of litigation. This memorandum first sets out a Summary of its analysis and then in more detail discusses (1) the text and apparent policy of the Constitution, (2) pertinent judicial decisions, and (3) possible objections to our recommendations.

SUMMARY

The constitutional text limits the use of the pocket veto to circumstances in which Congress, "by their Adjournment," has prevented use of the return veto. The constitutional question is, therefore, when does Congress' adjournment prevent the President from returning a bill with his objections. As a matter of pure logic, the answer to that question would be (1) during a recess when no agent of

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the originating House is available to accept the return and (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other circumstances, Congress could consider the President's objections to the bill and complete the legislative process by sustaining or overriding the veto. Although the history of the Constitutional Convention sheds little further light on this matter, it is apparent that the Framers intended the President to exercise only a qualified negative over legislation and did not contemplate an expansive reading of the Pocket Veto Clause.

The judicial history of the Clause introduces some confusion, however. In The Pocket Veto Case, the Supreme Court sanctioned the use of the pocket veto during a long inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But just nine years later, in Wright v. United States, the Court sanctioned the use of the return veto during a shorter intra-session recess of the originating House, and in doing so significantly, although in part implicitly, retracted much of its analysis in the earlier case. At a minimum, Wright stands for the proposition that a veto may be returned to an accredited agent of the originating House while that House is not in session. In Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit extended the Supreme Court's reasoning in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress. We believe that decision was correct. The Constitution requires the unsigned bill to be returned to the originating House; if, as in Wright, the temporary absence of the originating House does not prevent a return, we see no reason why the simultaneous absence of the nonoriginating House should change that result.

The case now pending in the District Court for the District of Columbia, Kennedy v. Jones, involves the use of pocket vetoes during (1) a somewhat longer (32-day) intra-session adjournment of Congress and (2) an inter-session adjournment. We do not believe that the length of the intra-session adjournment can be constitutionally significant under modern conditions, so long as an agent remains behind who is authorized and available to receive a return veto. Nor do we regard the difference between intra-session and inter-session adjournments to require a difference in constitutional practice; in both situations the same Congress that passed the bill would, upon reconvening, be able to consider the President's objections and determine whether they should be sustained or overridden; in those circumstances the return of the bill would not appear to have been prevented within the meaning of the Pocket Veto Clause.

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I. Constitutional Text and Policy

The second paragraph of Article I, Section 7, of the Constitution provides in relevant part as follows:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law * * * If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in the like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Were we construing the Constitution afresh, neither enlightened nor encumbered by later judicial gloss, it would appear obvious that the return veto is required in all cases where Congress has not made its use impossible. The normal course of interaction between a Congress and a President who disagree is prescribed as: legislation, return veto, attempt to override. The President thus has a qualified negative over legislative acts. The pocket veto exists solely to prevent Congress from depriving the President of that qualified negative and so leaving the legislative power completely unchecked.

The return veto requires Congress to muster a two-thirds majority to override. The pocket veto, by requiring Congress to reenact the legislation and then muster a two-thirds majority to override a subsequent return veto, thus requires congressional consideration of the same measure not two but three times before the President's qualified negative may be overcome. There can be no justification for placing that burden on the process except that Congress itself has made it inevitable by preventing the use of the return veto.

This said, it follows that the use of a pocket veto is improper whenever a return veto is possible. The pocket veto is not properly viewed, in the constitutional design, as a presidential prerogative; it is, rather, a narrowly limited

presidential defense to the exercise by Congress of the latter's own prerogative, "by their Adjournment," to prevent the return of an unsigned bill.

The constitutional question, then, is when is a return veto impossible, when does "Congress by their Adjournment prevent [a bill's] Return." The Constitution does not answer explicitly, but the plain indication that the return veto is heavily preferred and the practical construction that should be given the concept of impossibility argues that the pocket veto is proper in only two circumstances: (1) during an intra-session or inter-session recess when no officer or designated agent of the House in which the bill originated is available to accept the return; or (2) when a Congress, or either House of it, has finally adjourned so that the Congress that next meets will not be the same legislative body.

The procedures required (or not required) by Article I, Section 7, support these conclusions. The President is required to return the bill within ten days (Sundays excepted), but there is no time limit, express or implied, placed upon the obligation of the House to which the bill is returned to "enter the Objections at large on their Journal, and proceed to reconsider" the bill. This suggests that the length of an adjournment or recess is irrelevant to the question of whether a return or a pocket veto is appropriate. The relevant consideration is the ability of the President to make the return. (It is also true that only when a Congress has ended would it be impossible for a House to "proceed to reconsider.")

It has been contended that a return veto is impossible unless the originating House is in session. The constitutional text imposes no such requirement, however, and there is no apparent reason why it should be implied. The bill is required to "be presented to the President of the United States," but it has never been doubted that his agent at the White House may accept the presentation and that the President's ten days begins to run then, even if he does not return to the White House or even to the country during that period. There being no time limit upon the reconsideration of a vetoed bill by the originating House, there is even less reason to suppose that the return veto cannot be made to its officer or agent for action when that House reassembles.

Finally, it should be noted that the constitutional text does not prescribe a time limit for the period between the passage of a bill and its presentation to the President. Thus, were it supposed that the President had a power to pocket veto a bill because the tenth day fell during a recess or adjournment, Congress could defeat the power by leaving a bill with an officer instructed to present it to the President nine days before the end of any recess or adjournment.

This fact reduces the argument for the power to pocket veto during intra-session or inter-session recesses or adjournments to the level of constitutional triviality. The power would arise only by accident, oversight, or when Congress preferred a pocket veto to a return veto. These are not considerations that rise to the level of constitutional argument.

The legislative history of the veto provisions, though by no means conclusive, tends to confirm the argument from the text. There is abundant evidence from the proceedings of the Constitutional Convention, and from other sources, that the Framers viewed any veto as a limited exception to their basic legislative scheme according ultimate authority over the passage of federal legislation to the Congress. The absolute veto power that had been possessed by the King of England and by many of the colonial governors had been a major source of friction between the Colonies and England during the pre-revolutionary period, and efforts to confer a like power upon the President were expressly rejected by the Framers. See 1 M. Farrand, The Records of the Federal Convention of 1787 (1937 ed.), at pp. 104, 106; 2 M. Farrand, at pp. 71, 200, 301, 582, 585.

At the same time, however, the Framers were apparently convinced that the power to enact laws for the governance of the Nation was of too great a magnitude to allow it to be given to the legislative branch without any checking or balancing provisions. They therefore conferred upon the President the power to exercise a "qualified negative" (see the Federalist, No. 69) over proposed legislation, a negative requiring the Congress to reconsider bills of which the President disapproved but which could be overridden by a two-thirds majority of both Houses. The history of the clause thus clearly counsels a narrow construction of the occasions for its exercise (see e.g., 1 J. Story, Commentaries on the Constitution of the United States §891 (5th ed., 1905)). This view of the veto as a qualified negative does not support an expansive view of the scope of presidential power to use the pocket veto.

II. Judicial Decisions

The Supreme Court has addressed the scope of the Pocket Veto Clause on only two occasions -- in The Pocket Veto Case, 279 U.S. 655 (1929), and Wright v. United States, 302 U.S. 538 (1938). Since on neither occasion did the Court undertake an exhaustive examination of the circumstances in which use of the pocket veto would be constitutionally appropriate, many questions are left open to debate. Moreover, some of the Court's rationale in The Pocket Veto Case appears

inconsistent with the text and history of the relevant constitutional provisions and, indeed, with some of the Court's rationale in the subsequent Wright decision.

Although the holding in The Pocket Veto Case might well be affirmed were the Court presented in the future with a case involving the same facts, we do not believe -- given the significantly different approach to the Pocket Veto Clause embraced in Wright -- that the Court's original rationale would survive intact. Indeed, portions of that rationale were either directly or indirectly rejected in Wright. The Court's opinion in the latter case strongly suggests, in our judgment, that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress so long as (1) appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment and (2) the length of the adjournment did not exceed the lengths of adjournments that have become typical in modern times. We think it likely, moreover, that the Court might drop the second factor, i.e., that the length of the adjournment might be held irrelevant and thus not a reason for allowing the use of a pocket veto.

A. The Pocket Veto Case. The Supreme Court held in The Pocket Veto Case that the inter-session adjournment of both Houses of the 69th Congress, which lasted for approximately five months, had prevented the President from returning with his objections a bill that had been presented to him eight days before the adjournment. The Court thus rejected the contention made by the petitioners and the amicus curiae that the President's failure to return the bill to the Congress, with his objections, within ten days of its having been presented to him had resulted in its having become a law without his signature.

The principal factors relied upon by the Court in support of this holding were that (1) the word "House" appearing in the second paragraph of Article I, Section VII. of the Constitution requires that the House in which the bill originated be "in session" on the tenth day following the bill's presentation to the President, and that appointment by that House of an officer or other agent authorized to receive presidential messages during the adjournment therefore would neither prevent the President from exercising a pocket veto nor empower him to exercise a return veto after the originating House had adjourned; (2) the return of a bill disapproved by the President during an inter-session adjournment of the Congress would produce precisely the sort of delay in the bill's final disposition, and uncertainty concerning its status prior to Congress' having reconvened, that the relevant constitutional provisions were designed to

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prevent; and (3) the use of a pocket veto in the circumstances presented by the case was consistent with "the practical construction that has been given to [the relevant provisions] by the President through a long course of years, in which the Congress has acquiesced" (279 U.S. at 688-689).

If extended to its logical conclusion, the reasoning employed by the Court in The Pocket Veto Case would have led ultimately to the conclusion that whenever the originating House is in recess at the end of the tenth day (excluding Sundays) following presentation of a bill to the President, the withholding by the President of his signature would prevent the bill from becoming a law. This conclusion would have followed without regard to the brevity of the recess, the availability of reliable and efficient means of returning the bill to the originating House with the President's objections, or the willingness of the Congress as a whole promptly to reconsider the bill following its return. Thus, had the originating House recessed simply for the afternoon of the tenth day following the presentation of a particular bill, the logic of the Court's reasoning in The Pocket Veto Case would have required it to sustain the President's pocket veto.

The only alternative would be to make the veto's effectiveness turn upon the length of the recess, but this would require the Court arbitrarily to assign a limit to the length of a recess during which a return veto could be required. There is no warrant for such a procedure in the Constitution.

B. Wright v. United States. The petitioner in Wright attempted to take advantage of the logic of the Court's reasoning in The Pocket Veto Case, and contended that a particular bill had become a law because (1) it had been return vetoed by the President during a three-day intra-session recess taken by the Senate, the originating House, and (2) no pocket veto could have been exercised during that period since Congress as a whole had not adjourned within the meaning of the phrase "unless the Congress by the Adjournment prevent [the bill's] return." In rejecting these contentions, the Supreme Court pointed out that if a messenger may "present" a bill to the President while the President is temporarily absent from the White House and if the same bill may be returned by messenger to the originating House with a statement of the President's objections, the "plainest practical considerations" suggest that the return veto may be received by "an accredited agent" of the originating House (302 U.S. at 590). The Court also noted that the dangers it had apprehended in The Pocket Veto Case, stemming from delay in the final disposition of a bill disapproved by the President and uncertainty concerning its status following the return veto, are illusory when the originating House has taken "a mere temporary recess" (id. at 595).

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Although the Court in Wright did not expressly disavow any part of the opinion in The Pocket Veto Case, it did feel compelled to repeat Chief Justice Marshall's admonition "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used * * *" (*id.* at 593). As Justice Stone, who would have held that the President's failure to sign the bill in question had prevented its becoming a law, noted in his concurring opinion (which was joined by Justice Brandeis), however, the Court's opinion in Wright reflected a significantly different approach to the Pocket Veto Clause than had been employed in The Pocket Veto Case (see *id.* at 598-609). Specifically, (1) the Court held in Wright that the President's return veto had been effective despite the fact that at the time of the return the originating House was not "in session"; (2) it approved the return of a vetoed bill to "an accredited agent" of the originating House, even though that House had not specifically authorized an agent to receive return vetoes during the recess and despite the Court's statement in The Pocket Veto Case that "the delivery of the bill [being returned] to [an] officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate" (279 U.S. at 684); and (3) it refused to permit its decision to be influenced by past executive or congressional practice, noting that "[t]he question now raised has not been the subject of judicial decisions and must be resolved not by past uncertainties, assumptions or arguments, but by application of controlling principles of constitutional interpretation" (302 U.S. at 597-598). Wright undercut much of the rationale of The Pocket Veto Case and left the law in some confusion.

C. Kennedy v. Sampson. A close reading of the Supreme Court's opinions in The Pocket Veto Case and in Wright reveals a rather dramatic shift of emphasis in the latter in favor of essentially practical considerations. This shift of emphasis figured significantly in the recent decision of the Court of Appeals for the District of Columbia Circuit in Kennedy v. Sampson, 511 F. 2d 430 (1974). The court of appeals held in Kennedy that the Christmas recess taken by both Houses of the 91st Congress had not prevented the President from exercising return vetoes during that period and that the President's failure to sign or to return veto a particular bill during the recess had resulted in the bill's having become a law without his signature. The court relied heavily upon the practical considerations discussed in Wright in concluding that neither the length of the Christmas recess (five days for the originating House, as opposed to the three days involved in Wright), nor the fact that (unlike the situation in Wright) both Houses of the Congress were in recess on the tenth day (excluding Sundays) following presentation of the bill to the President, had empowered the President to exercise a pocket veto.

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The court of appeals began its analysis "with the premise that the pocket veto power is an exception to the general rule that Congress may override presidential disapproval of proposed legislation" (511 F. 2d at 437). The Pocket Veto Clause was thus viewed as "limited by the specific purpose[s] it [was] designed to serve" (*ibid.*); the court reasoned that the clause was to be construed in a manner that frustrated neither of the "fundamental purposes" that had been identified by the Supreme Court in *Wright* (*id.* at 438; quoting from *Wright, supra*, 302 U.S. at 596):

(1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. * * *

The only aspect of the rationale of the decision in *The Pocket Veto Clause* not modified by the decision in *Wright* concerned the constitutional significance of delay in a bill's final disposition and public uncertainty regarding its status prior to Congress' having reconvened. The court of appeals in *Kennedy* brushed this consideration aside, noting that, "[p]lainly, intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*" and that "[m]odern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen" (511 F. 2d at 411). The court concluded that use of the return veto during an intra-session adjournment would create no intolerable public uncertainty (*ibid.*; footnotes omitted):

[The] return of a bill during an intra-session adjournment * * * generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session. The only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment "prevents" the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity.

The court of appeals left little doubt in *Kennedy* that it would hold that the President is not constitutionally empowered to pocket veto proposed legislation during an intra-session recess, whatever its length, so long as the originating House had authorized an officer or other agent to

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receive presidential messages during its absence. Since we can not perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment, we believe that that court would extend its holding to inter-session adjournments as well.

Although we were somewhat troubled by the breadth of the court of appeals' opinion in Kennedy, for a variety of reasons we determined not to petition for a writ of certiorari in that case. First, the result in the case seemed to us to be unquestionably correct. Consequently, were we to have sought further review we would have been in the untenable position of agreeing with the actual holding in the case and with much of the court's reasoning, and of asking the Supreme Court merely to disapprove certain dicta. Second, it was our understanding that, by the time the decision in the Kennedy case was issued, executive policy with respect to pocket and return vetoes either accorded with that decision or would be modified accordingly. And, finally, we regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue -- a question the Court obviously would have had to reach prior to dealing with the merits of the case.

D. Pending Litigation. Although pocket vetoes have been used many times during intra-session and inter-session adjournments (see The Pocket Veto Case, 279 U.S. at 690-691; Kennedy v. Sampson, 511 F. 2d at 442-445), there have been very few cases challenging the constitutionality of the practice. A partial explanation for this is that development of the doctrine of congressional standing to sue is a relatively recent phenomenon. We may expect litigation with congressmen over every future use of the pocket veto during an adjournment that is not final. Such cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. The dispute concerning congressional standing will, in the long run, pose a much more serious threat both to traditional executive prerogative and to constitutional modes of governance than does acceptance of a narrowed scope for the pocket veto power -- particularly since Congress can completely frustrate the use of the pocket veto during other than final adjournments by the simple expedient of delaying the presentation of bills until their return dates coincide with times when the originating House, or both Houses, are scheduled to be in session.

We therefore believe that judgment on the merits should be accepted in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.) -- a suit filed by Senator Kennedy and involving two pocket vetoed bills. The first bill (H.R. 10511) would have amended the Urban Mass Transportation

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Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill was pocket vetoed by President Nixon during the sine die adjournment of the 1st Session of the 93d Congress, which lasted 29 days. The second bill (H.R. 14225) would have amended the Vocational Rehabilitation Act by extending the authorization of appropriations for certain programs for the handicapped for one year, making certain changes in federal programs for blind persons and providing for the convening of a White House Conference on Handicapped Individuals. President Ford pocket vetoed the latter bill during a 32-day intra-session recess taken by both Houses of the 93d Congress. The Congress subsequently passed bills identical to those that had been pocket vetoed, and they were ultimately signed into law, so that nothing of any significance other than legal issues is now at stake.

We therefore argued in Kennedy v. Jones that that case is moot. That argument has failed. We must now accept judgment and make the recommended public announcement on behalf of the President or continue to litigate the case. If we litigate, we are certain to lose both the standing issue and the pocket veto issue in the court of appeals. Nothing would be gained by litigating further unless we went to the Supreme Court. Either we or Senator Kennedy may attempt to bypass the court of appeals by petitioning the Court for certiorari before judgment. The case could be argued as early as next October. In any event, we believe we would run a very substantial risk of losing the congressional standing issue in the Supreme Court in this context and, if we did, would almost certainly lose the pocket veto issue. Further litigation risks much for very little prospect of gain.

III. Possible Objections to Restricting Use of the Pocket Veto to Final Adjournments of the Congress

Several possible objections have been raised to the recommendation that the President use pocket vetoes only upon the final adjournment of a Congress if, during all other recesses and adjournments, agents have been designated to receive return vetoes. The more important of these objections are analyzed here.

A. The decided cases support a distinction between intra-session recesses and inter-session adjournments, making it inadvisable for the President to surrender the power to pocket veto proposed legislation during inter-session adjournments.

We cannot perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment. The Court suggested in Wright that the determining factor so far as the permissibility of a pocket veto is concerned is the length of time the originating House is scheduled to be absent from its chambers, the consequent delay in the bill's final disposition, and public uncertainty concerning the bill's status prior to Congress' having reconvened. In recent years, however, inter-session adjournments have not consistently or significantly exceeded intra-session recesses in length. Indeed, the intra-session recess involved in Kennedy v. Jones was slightly longer than the inter-session adjournment in that case, which would make it particularly futile to urge the distinction suggested.

B. Although the President might not be "prevented" from returning a bill if only one House has temporarily recessed or adjourned, the temporary absence of both Houses might be held to prevent the bill's return.

The Supreme Court did state in Wright that, since the House of Representatives (the non-originating House in that case) had remained in session during the three-day recess taken by the Senate, the "Congress" had not adjourned and thus prevented "by their Adjournment" the return of the bill in question within the period prescribed for that purpose. But that observation was not accorded controlling weight by the Court since it simultaneously reserved the question whether a one-House recess longer in duration than the recess involved in that case would "prevent" the return of a vetoed bill. As Justice Stone pointed out in his concurring opinion in Wright, moreover, "it was the adjournment of the originating house with which the framers were concerned" (302 U.S. at 606). See also Kennedy v. Sampson, supra, 511 F. 2d at 440.

The distinction between a recess by one House and a recess by both is, in any event, of no particular significance if the important factors are, as those who make this point assume, the length of the recess and the unavailability of an originating House in session to receive a return veto.

C. Since the Supreme Court's holding in Wright was limited to disapproving a pocket veto exercised during a three-day recess, and the Court did not in that case disavow the discussion in The Pocket Veto Case concerning the constitutional significance of the delay and uncertainty inhering in longer recesses and adjournments, the President should continue to pocket veto bills of which he disapproves during congressional absences in excess of three days.

We believe that this objection was answered persuasively by the court of appeals in Kennedy v. Sampson. The recesses and adjournments taken by the Congress during recent years have not approached in length those taken at the time The Pocket Veto Case was decided. Moreover, the Congress may delay the presentation of an enrolled bill to the President until near the end of even a very long recess or adjournment -- and then need not reconsider the disapproved bill within any given period of time or, indeed, at all.

Finally, until the Congress has reconsidered the disapproved bill, and either sustained or overridden the President's veto, there will be public uncertainty concerning whether the bill will become a law. That uncertainty is no greater than in cases where Congress dawdles over the original passage of a bill or over an attempt to override a return veto. Indeed, it is hard to see what public uncertainty has to do with the issue at all. In the case of a return veto during a recess or adjournment, the public knows the bill has not become law and will not unless and until Congress overrides. Why that is of any concern, much less a factor of constitutional dimensions, remains a mystery. The Supreme Court mentioned it once but the argument about uncertainty will not withstand analysis. We therefore do not think the fact that an accredited agent of the originating House may have to hold a returned bill for a short period of time prior to the reconvening of the originating House has any significance under the Pocket Veto Clause.

D. Requiring the originating House specifically to authorize an officer or other agent to receive return vetoes during the temporary absence of that House from its chambers has no predicate in the text of the relevant constitutional provisions and does not distinguish earlier cases or practice.

The principal difficulty that must be faced in any attempt presently to delimit the scope of the Pocket Veto Clause is that the Supreme Court has complicated the inquiry with opinions

that are not completely reconcilable and, as a consequence, past executive practice with respect to return and pocket vetoes has not been entirely consistent. It is true that the Secretary of the Senate, to whom the Court held in Wright an effective return of the President's veto had been made during the Senate's three-day absence, had not been specifically authorized by the Senate to receive such vetoes. That fact obviously poses a problem in using the specific designation of an agent as a limiting principle for purposes of the Pocket Veto Clause. We also agree that, were determination of the scope of the Pocket Veto Clause a matter of first impression, the designation of an agent would be unnecessary if officers of the originating House were available.

We nevertheless believe that the chances are quite good that the Supreme Court would endorse the specific designation of an officer or other agent to receive return vetoes as a means of distinguishing past executive practice (and avoiding the resurrection of bills long since regarded as having been effectively pocket vetoed) and of providing guidance for the future. Clearly, a case-by-case determination of the effectiveness of pocket and return vetoes -- depending upon the length of the particular recess or adjournment -- would be entirely unsatisfactory. An approach to the Pocket Veto Clause requiring the Court to endorse a recess or adjournment of a specific length as permitting the President to return veto a bill would be both inconsistent with the Court's normal practice and exceedingly difficult to rationalize. Specific designation of an agent by the originating House at least evidences an effort by that House to keep open lines of communication with the President during temporary absences, and provides formal assurance that the Congress as a whole will receive formal notification upon its return of decisions made by the President with respect to specific legislation.

E. A determination by the President that he will return rather than pocket veto bills presented to him during temporary recesses and adjournments may result in the resurrection of bills pocket vetoed in the past.

Since we believe that the Supreme Court would refuse to recognize the effectiveness of a pocket veto exercised during a temporary recess or adjournment no longer in duration than those that have become common in recent years, so long as an officer or agent had been authorized by the originating House to receive presidential messages during that period, the danger that bills pocket vetoed in the past may suddenly spring to life confronts us regardless of present or future executive policy with respect to pocket vetoes. An attempt should be made promptly to identify bills that may be affected by various alternative theories of the Pocket Veto Clause, although we believe that the Supreme Court

would view sympathetically an argument that any future decision by it concerning the scope of the Pocket Veto Clause should be applied prospectively only.

F. A construction of the Pocket Veto Clause prohibiting the President from pocket vetoing bills during a temporary recess or adjournment creates a danger that the circumstances attending the President's decision to return veto a particular bill will have changed dramatically by the time the Congress has reconvened.

Since the Constitution does not place any limits upon the Congress' power to delay the presentation of an enrolled bill to the President, the danger that circumstances may change between the time of the President's consideration of a bill and Congress' reconsideration of that bill is unavoidable.

G. It is unrealistic to believe that the President can adopt the position that pocket vetoes are impermissible except following a final adjournment of the Congress without destroying the ability of his successors to assert the contrary.

We agree that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection but a proper result. The significance of this consideration is, in any case, substantially undermined by the very probable outcome of a Supreme Court test of the scope of the Pocket Veto Clause.

APPENDIX C

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, January 29, 1976.

THE PRESIDENT,
The White House, Washington, DC.

Dear Mr. President:

The Department of Justice is presently involved in a case which raises the question whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. That case, Kennedy v. Jones, is now pending in the District Court for the District of Columbia and concerns two bills which were pocket vetoed, the first by President Nixon during the sine die adjournment of the 1st Session of the 93rd Congress, which lasted 29 days, and the other by you during a 32-day intra-session recess taken by both Houses of the 93rd Congress. The bill pocket vetoed by President Nixon would have amended the Urban Mass Transportation Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill which you pocket vetoed would have amended the Vocational Rehabilitation Act in connection with certain programs for the handicapped. Congress has since passed bills identical to the bills which were pocket vetoed, and they have been signed into law.

After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

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the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the *Federalist*, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

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It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

EDWARD H. LEVI,
Attorney General.

APPENDIX D

SHEARMAN & STERLING,
New York, August 7, 1987.

Mr. BENJAMIN C. BRADLEE,
Executive Editor, *The Washington Post*, Washington, DC.

Dear Sir:

I am Immediate Past Chairman of the Section of Antitrust Law of the American Bar Association. I write this letter on behalf of myself and the previous Chairmen of the Section listed below.* We write to take issue with Colman McCarthy's criticisms in his article of July 12, 1987 stating that Judge Robert Bork's views on antitrust law are "over the edge" and anticonsumer.

To the contrary, Judge Bork's writings in this area have been among the most influential scholarship ever produced. While not all of us would subscribe to its every conclusion, we strongly believe that The Antitrust Paradox, which he published in 1978, is among the most important works written in this field in the past 25 years.

It is indicative of the value of Judge Bork's contributions that The Antitrust Paradox has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication.

* The opinions expressed herein are those of the individuals listed below and are not intended to represent those of the Section of Antitrust Law or the American Bar Association.

Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in Cargill v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in Matsushita Electrical Industries v. Zenith Radio Co., 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and NCAA v. Board of Regents, 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978) and United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978). Justice O'Connor also relied on The Antitrust Paradox in her concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984), as did Justice Blackmun in his dissent in National Society of Professional Engineers v. United States, 435 U.S. 679, 700 n.* (1978). It should also be noted that every member of the present Supreme Court joined one or another of these opinions.

In light of the fact that six of the nine present Justices have cited Judge Bork's book and that all of them have joined opinions citing it, Mr. McCarthy's claim that Judge Bork's antitrust views are "so far on the fringes of irrelevant extremism that [Bork] disqualifies himself from the debate" demonstrates more clearly than anything we could say that Mr. McCarthy does not know what he is talking about.

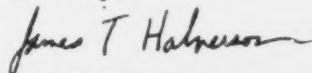
Mr. McCarthy is also quite wrong in his suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

- (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,
 - (2) "Competition", for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.
- R. Bork, The Antitrust Paradox 51 (1978).)

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Thus, we fear that it is Mr. McCarthy, and not Judge Bork, who is out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis. Fortunately, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Sincerely,



James T. Halverson
Shearman & Sterling
New York, New York
Immediate Past Chairman
Section of Antitrust Law
American Bar Association

On behalf of himself and:

Richard A. Whiting
Steptoe & Johnson
Washington, D.C.
Section Chairman, 1984-85

Richard W. Pogue
Jones, Day, Reavis & Pogue
Cleveland, Ohio
Section Chairman, 1983-84

Carla A. Hills
Weil, Gotshal & Manges
Washington, D.C.
Section Chairman, 1982-83

E. William Barnett
Baker & Botts
Houston, Texas
Section Chairman, 1981-82

Harvey M. Applebaum
Covington & Burling
Washington, D.C.
Section Chairman, 1980-81

Earl E. Pollack
Sonnenschein, Carlin,
Nath & Rosenthal
Chicago, Illinois
Section Chairman, 1979-80

Allen C. Holmes
Cleveland, Ohio
Section Chairman, 1978-79

Ira M. Millstein
Weil, Gotshal & Manges
New York, New York
Section Chairman, 1977-78

Edwin S. Rockefeller
Schiff Hardin & Waite
Washington, D.C.
Section Chairman, 1976-77

John Izard
King & Spaulding
Atlanta, Georgia
Section Chairman, 1974-75

Julian O. von Kalinowski
Gibson, Dunn & Crutcher
Los Angeles, California
Section Chairman, 1972-73

Richard K. Decker
Of Counsel
Lord, Bissel & Brook
Chicago, Illinois
Section Chairman, 1971-72

Frederick M. Rowe
Kirkland & Ellis
Washington, D.C.
Section Chairman, 1969-70

Miles W. Kirkpatrick
Morgan, Lewis & Bockius
Washington, D.C.
Section Chairman, 1968-69

APPENDIX E

Statement of

PHILIP A. LACOVARA

FORMERLY COUNSEL TO THE WATERGATE SPECIAL PROSECUTOR

Submitted to the
Senate Committee on the Judiciary

in Connection with the
NOMINATION OF ROBERT H. BORK,
To be Associate Justice of the Supreme Court

During the hearings on the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court, a number of questions have arisen about his role in the so-called "Saturday Night Massacre" and the events immediately following it. Since I was a personal participant in many of the events about which Judge Bork has been examined, I want to make certain that the record accurately reflects what occurred, as I have already reported to the Staff of the Judiciary Committee. In sum, the substance of Judge Bork's testimony, as I understand it, accurately reflects the tone and direction of his statements to the senior staff of the Watergate Special Prosecution Force in the hours and days after his dismissal of Special Prosecutor Archibald Cox.

I

From early July 1973 until the end of September 1974, I served as Counsel to the Special Prosecutor, Watergate Special Prosecution Force. In that role, I was the lawyer primarily responsible for advising Special Prosecutor Archibald Cox and then his replacement, Leon Jaworski, on legal and policy matters. I was also in charge of litigation of these issues. In particular, I was responsible for advising the Special Prosecutors on questions of executive privilege, including particularly subpoenas for production of White House tapes. Deputy Special Prosecutor Henry S. Ruth and I were the two senior members of the large staff that Mr. Cox had assembled as part of the Watergate Special Prosecution Force.

II

As I understand it, one of the main questions raised about the testimony Judge Bork has given both during his 1982 confirmation hearings for his seat on the Court of Appeals and during his current hearings is whether his recollection of his conduct immediately after the dismissal of Mr. Cox on Saturday, October 20, 1973, represents "revisionist history" and whether he was only willing to cooperate with the Watergate investigations after he detected the so-called "fire storm" that developed in the days following the dismissal of Mr. Cox. I was there, and it is unfair and inaccurate to insinuate that Judge Bork has shaded his testimony.

III

At the outset, I want to state, as I have in print before, that I thought at the time and continue to think now that Judge Bork made the "wrong" decision when he decided to comply with President Nixon's instruction to dismiss Mr. Cox, rather than to follow the path chosen by Attorney General Richardson and Deputy Attorney General Ruckelshaus. Nevertheless, from the first conversation that I had with Mr. Bork on the evening of the Saturday Night Massacre and from subsequent conversations, I have been satisfied that he acted for what were reasoned and reasonable motives and that his conduct was in all respects honorable.

IV

After the early evening announcement on Saturday, October 20, of the dismissal of Mr. Cox, most of the members of the staff of the Watergate Special Prosecutor's office gathered at the headquarters of the prosecution team to consider whether the dismissal would undermine or abort the many ongoing investigations under our jurisdiction. At 9:50 p.m. that night, I telephoned Mr. Bork at his home to discuss that issue, and specifically to learn whether he had intended to discharge the Assistant Special Prosecutor who had actually been conducting the investigations.

It would be hard to overstate the importance of that question. In the five months since his appointment as Special Prosecutor, Mr. Cox had assembled a staff of approximately 35 Assistant Special Prosecutors who had already commenced a number of grand jury proceedings into the Watergate break-in and cover-up and into a variety of other highly sensitive matters assigned to the Watergate Special Prosecution Force. Mr. Cox had carefully recruited his staff to assure that they would be completely independent of any governmental or political relationship that would call into question their objectivity and independence. Each of the staff prosecutors was specially appointed for this assignment. If Mr. Bork as Acting Attorney General had not only dismissed Mr. Cox, but

also dissolved the staff and terminated the special appointments, there would have been substantial and perhaps irreparable obstruction of the ongoing criminal investigations.

During my conversation with Mr. Bork within a few hours of the announcement of Mr. Cox's dismissal, however, he assured me that he had not endeavored to do anything beyond follow the narrowest interpretation of the President's instruction, which was to dismiss Mr. Cox. Although I expressed to him in the strongest possible terms my objection to that decision, he provided to me the same explanation that he has provided on many occasions since then: that in his discussions with Attorney General Richardson about the options, he had concluded, and that Mr. Richardson had concurred, that the personal pledge of tenure that the Attorney General had given when he selected Professor Cox did not apply to other officials of the Department of Justice; that in Mr. Bork's view the President had the lawful constitutional power to order the dismissal of any employee of the executive branch in a position such as Mr. Cox's; and that, most important, his decision to take the course that he initially favored--to resign rather than to execute the President's directive--would have established a pattern causing the resignation of all policy level officials of the Justice Department, thus leaving thousands of ongoing civil and criminal matters without policy level direction.

Mr. Bork assured me that his compliance with the instruction to discharge Mr. Cox had no effect on the authority or tenure of the several dozen prosecutors who had been conducting the investigations under Mr. Cox's jurisdiction. I promptly reported that assurance to the staff.

V

From 6 p.m. until 8:15 p.m. on Monday, October 22nd, Deputy Special Prosecutor Ruth and I met with Acting Attorney General Bork and the head of the Criminal Division, Henry Petersen, to discuss the continued pursuit of the investigations. Although that meeting was quite heated--largely because of exchanges between Mr. Petersen and me--my distinct recollection of the tone of the meeting was that Mr. Bork was sincerely dismayed that I might perceive his action as an effort to interfere with the administration of justice. He repeated to Mr. Ruth and me the same explanation that he had given me on Saturday night for his reluctant decision to obey the President's direction. He said that he had been confident that, at some point after the entire policy level of the Department of Justice had been wiped out in a pattern of resignations, some senior civil servant next in line to become "Acting Attorney General" would have obeyed the President's instruction and ordered Cox's dismissal. Since the result was, in Mr. Bork's view, inevitable, since he considered the order--however unwise--to be within the President's

constitutional power, and since he regarded mass resignations at the Department of Justice as a greater obstacle to the administration of justice, he explained that he had decided to implement the directive.

At that meeting he repeated the assurance that he had given within hours of dismissing Mr. Cox that he hoped that the staff that Mr. Cox had assembled was to remain on duty. Although the Watergate Special Prosecution Force would formally become part of the Criminal Division, subject to general oversight by Assistant Attorney General Petersen, a career Justice Department prosecutor, whose integrity had never been at issue, both Acting Attorney General Bork and Mr. Petersen repeatedly insisted that they expected a full and thorough investigation of all the matters under our jurisdiction. Both men made it clear that they would not be parties to any effort to impede these investigations or to cover up any criminal involvement by any White House officials.

One of my most vivid recollections of that evening is that it was plain that, because of his peripheral role as Solicitor General, Mr. Bork had not been familiar with the depth and scope of the sensitive investigations assigned to the Watergate Special Prosecutor beyond those that have come to be known as the "Watergate" investigations. Some of those investigations involved not only allegations against senior White House officials, including the President, but also

allegations about then-present or former officers of the Department of Justice itself. When I explained that it was the existence and delicacy of those investigations that underscored the need for a Special Prosecutor, Mr. Bork appeared to recognize that the affair had dimensions that he had not previously appreciated.

Despite some suggestions by others to the contrary, Mr. Bork reiterated that night his commitment to full and vigorous investigations as long as he remained Acting Attorney General. I specifically recall the assurances that he and Assistant Attorney General Petersen gave that the investigations would proceed on an objective, thorough and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation.

None of the four men meeting in the Solicitor General's office that evening knew precisely what would happen next, and both Mr. Bork and Mr. Petersen urged Henry Ruth and me to do whatever we could to keep the staff together and to remain at our posts as well. We left for later discussion the determination of precisely what investigative methods to use in pursuing the investigations.

Later that night and then again the following morning, Tuesday, October 23rd, Henry Ruth and I met with the rest of the staff to convey to them the assurances that we had received

from Acting Attorney General Bork and Mr. Petersen that they wanted the investigations to continue vigorously and that they would protect the integrity of those investigations. As a result of those assurances, Mr. Ruth and I, and the remainder of the staff, resolved that we would continue to conduct the kind of independent investigations that Professor Cox had hired us to pursue, unless and until either Mr. Bork or Mr. Petersen took action inconsistent with those assurances.

VI

There was no such contrary action from either man. Later that morning, Tuesday, October 23--the first business day after the "Saturday Night Massacre" and the first day possible for court proceedings--I spoke with Acting Attorney General Bork to tell him that the staff would remain on duty. I also informed him that it was our intention to take an action that would necessarily be regarded as a direct attack on the instructions that General Alexander Haig, President Nixon's White House Chief of Staff, had given as part of the "Saturday Night Massacre": the instructions to the Federal Bureau of Investigation and then subsequently to the United States Marshal's Service to take custody of the investigative files that the Watergate Special Prosecution Force had developed. The action that we were planning to take, I informed Mr. Bork, was to ask Chief Judge John Sirica, in his capacity as the judge supervising the federal grand juries, to issue a

protective order placing all of the investigations files under the custody of the lawyers in the Watergate Special Prosecution Force as "agents" of the grand jury, and enjoining any other officials of the government from interfering with our custody and use of those materials. That action was intended to override directly any assertion of White House power to assume control of our sensitive investigative files.

Despite the obviously sensitive nature of that plan, Acting Attorney General Bork assured me that he concurred with it and was prepared to "stipulate" to the entry of the order, although he expressed concern that no one should infer from it that either he or Mr. Petersen would otherwise be "looting" the files. Mr. Bork gave me this assurance before the President's lawyer, Charles Alan Wright, later announced that the President was going to comply with the subpoena for White House tapes.

As further evidence of the reliability of the assurances that both Mr. Bork and Mr. Petersen had given us about their support for the integrity and independence of investigations of high level misconduct, free from White House interference, Assistant Attorney General Petersen personally joined the petition that I had informed Mr. Bork we would be filing to obtain a protective order prohibiting anyone from removing any grand jury records from the office of the staff of the Watergate Special Prosecution Force.

In addition, there was a question about who should represent the Government in the proceedings that Chief Judge Sirica scheduled for the afternoon of Tuesday, October 23, to ascertain whether the President would comply with the order of the Court of Appeals requiring production of the White House tapes. After we gave Mr. Petersen general briefings on the scope of the investigations that we were conducting, and specifically on the positions that the Watergate Special Prosecution staff was planning to take in further court proceedings over the subpoenaed tapes, Acting Attorney General Bork expressly agreed that the lawyers whom Archibald Cox had selected should continue to handle all court proceedings relating to matters under our jurisdiction.

Indeed, to the best of my recollection, Mr. Bork and Mr. Petersen approved every recommendation that we made between the "Saturday Night Massacre" and the appointment of Leon Jaworski as the new Special Prosecutor.

VII

It is, therefore, unfair and inaccurate to suggest that Mr. Bork's recollection of the events surrounding the "Saturday Night Massacre" and his posture in those events has been skewed either by the "fire storm" that began building during the following week or by the desire to win confirmation of his nomination to the Supreme Court. My recollection of the

events in which I personally participated is substantially the same as his. I am very clear on this, because, as I mentioned earlier, I have always been of the view that Mr. Bork should have made a different judgment when he decided to obey the order to discharge Professor Cox, and I was quite alert to any indication that the judgment he did make reflected a desire to impede or undermine the integrity and vigor of the investigations that Mr. Cox was supervising.

Moreover, my impressions do not stand alone. In October 1975, the Watergate Special Prosecution Force published a 277 page official Report attempting "to describe accurately and completely the policies and operations of the Watergate Special Prosecution Force from May 29, 1973 to the middle of September 1975." (p.3) Of direct relevance to the matter before the Committee is the conclusion expressed on page 11 of that Report, which represents the contemporaneous assessment of the events by the prosecutors who were directly affected by them:

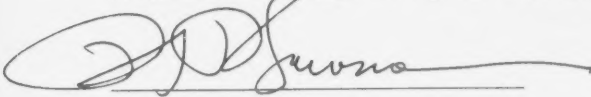
"The 'Saturday Night Massacre' did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House." (Emphasis added.)

VIII

Both this Committee and the Senate have before them a decision of enormous consequence for the Supreme Court and the country as well as for Judge Bork. In my judgment, it would be a terrible injustice to history as well as to Judge Bork to rely on a skeptical and inaccurate misunderstanding of his motives and actions during and after the "Saturday Night Massacre," when members of the Committee and of the full Senate decide whether to advise and consent to the nomination.

I would be pleased to appear personally before the Committee to answer questions about these events. In any event, I respectfully request that this statement be included as part of the record of the hearings on the nomination.

I declare under penalties of perjury that the foregoing statement is true, to my best belief and recollection.

A handwritten signature in dark ink, appearing to read "J. William Smith", written over a horizontal line.

Washington, D. C.
September 22, 1987

APPENDIX F

FOR IMMEDIATE RELEASE

October 20, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

October 20, 1973

Dear Mr. Bork:

I have today accepted the resignations of Attorney General Richardson and Deputy Attorney General Rockelshaus. In accordance with Title 28, Section 508(b) of the United States Code and of Title 28, Section 0, 132(a) of the Code of Federal Regulations, it is now incumbent upon you to perform both the duties as Solicitor General, and duties of and act as Attorney General.

In his press conference today Special Prosecutor Archibald Cox made it apparent that he will not comply with the instruction I issued to him, through Attorney General Richardson, yesterday. Clearly the Government of the United States cannot function if employees of the Executive Branch are free to ignore in this fashion the instructions of the President. Accordingly, in your capacity of Acting Attorney General, I direct you to discharge Mr. Cox immediately and to take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force.

It is my expectation that the Department of Justice will continue with full vigor the investigations and prosecutions that had been entrusted to the Watergate Special Prosecution Force.

Sincerely,

RICHARD NIXON

Honorable Robert H. Bork
The Acting Attorney General
Justice Department
Washington, D. C.

APPENDIX G

Telegram to be sent by Professor Kauper to Senators Eiler and Thurmond on September 30, 1957:

"During my testimony before your Committee on September 20, no questions were raised concerning the so-called Saturday Night Massacre. As Assistant Attorney General for the Antitrust Division, I was in regular communication with Acting Attorney General Bork in the days immediately following. Had the appropriate question been raised in my appearance before the Committee, I would have testified that either on Monday, October 23, or Tuesday, October 24, 1957, Judge Tamm indicated to me that he had begun inquiries about who might serve as special prosecutor if needed, and that Dean Javoraki had been recommended to him."

APPENDIX H

THE WHITE HOUSE ✓
WASHINGTON

October 24, 1973

MEMORANDUM FOR AL HAIG

FROM: LEN GARMENT

This is the product of this morning's discussion among Bork, Bryce, Fred and myself. It could be used as an opening statement by the President tomorrow. The principal substantive item is the proposal for an advisory committee.

g

cc: Fred Buzhardt
Ron Ziegler
Bryce Harlow

10/24/73

I frankly recognize that we have reached a crisis of confidence that words alone cannot dispel. There are deep suspicions in the country concerning the conduct of the American government with respect to the conduct of the investigations into Watergate and related matters that only resolute action can quiet. I believe those suspicions to be unfounded and to rest upon a misunderstanding of what we have proposed and what we have done. But I also know that I must do far more than explain the reasonableness of the compromise I proposed last week or the reasons why I could not accept flat defiance of my orders by a member of the Executive Branch.

Instead, I appear before you tonight to answer questions about the actions I have taken and the actions I am now taking in order once and for all to dispel suspicions and make it possible to get on with pressing national business.

You all know the action that I have taken. On Tuesday I ordered my attorneys to appear in court and announce full compliance with Judge Sirica's order as modified by the Court of Appeals. In doing that I gave way on a deeply held principle of Presidential confidentiality and I must hope that I have not done irreparable damage to the office and to the necessary confidentiality that all Presidents of the United States have needed and that all future Presidents will need if they are to govern effectively.

But there is a consideration greater even than the crucial principle of confidentiality and that is the continued effectiveness and credibility of the government of the United States, both at home and abroad. That is always of paramount importance and in these times of international crisis with the ever-present possibility of major-power confrontation, the effectiveness and credibility of the American government is indispensable to survival.

That is why I ordered full disclosure to the court of the material it sought. The court will now decide what material the grand jury needs in order to proceed with its decisions concerning the appropriateness of indictments.

But I also recognize that that step is not enough. What is necessary is to reassure the American people that the processes of American justice remain intact and with their integrity unimpaired. I know that it does and that the Department of Justice will proceed rapidly and even-handedly to investigate and, where called for, to prosecute all the matters formerly handled by the Special Prosecutor. But my confidence alone is not sufficient. The American people must see that justice is being done. Toward that end I propose two steps.

First, I am directing the Department of Justice to appoint as a special prosecutor a man of unimpeachable integrity and of experience in the field of criminal investigation and prosecution. He must be a man whose reputation and, even more, whose actions will show Americans of all political views that these prosecutions are free of partisan zeal and political considerations of any nature whatsoever.

- 3 -

Second, in order that that special prosecutor may have the counsel and, to be perfectly candid about it, the protection he needs from political attack, I will appoint a special advisory committee of lawyers with national reputations to oversee the investigations and prosecutions. I will, furthermore, ask the American Bar Association, to approve the names I submit for membership on this committee before they are appointed.

This committee will have complete access to the materials developed by the investigations and will have the power to order that indictments be brought or that they not be brought. It will, moreover, have the power to require that evidence be sought or that it not be sought. Probably, there will be very few cases of conflict between a responsible and experienced prosecutor and an equally responsible and experienced committee, but it is vital to the American public's perception of the course of justice that the committee be there to counsel and, if the case should ever arise, to control.

These measures are extraordinary, but extraordinary measures are required, and I am fully prepared to take them.

APPENDIX I

Nixon and Bork Reported Split on Prosecutor's Role

Difference Over Access To Documents Could Delay Appointment

By JOHN M. CREWDSON

Special to The New York Times

WASHINGTON, Oct. 28—An apparent conflict between President Nixon and his Acting Attorney General, Robert H. Bork, over the independence of a new special Watergate prosecutor could delay the naming of a replacement for Archibald Cox unless it is resolved in the next day or two.

President Nixon announced at a news conference Friday night that Mr. Bork would appoint a new prosecutor early this week, but he added that the White House had no intention of providing him with "Presidential documents" such as those Mr. Cox had requested.

Mr. Bork, on the other hand, has let it be known that he believes strongly that whoever takes the job from which Mr. Cox was dismissed a week ago "ought not to have any strings on him from anybody."

Cox Asks Guarantees

Mr. Cox maintained in a television interview today that it was "essential" that his replacement have statutory guarantees of freedom and independence from the President.

"Have I communicated to the White House my feeling that the special prosecutor ought to be free? The answer is yes," he said, adding that no "reputable man with a reputation to maintain" would accept the post without such assurances.

Possibility of Quitting

In the interview, Mr. Bork also raised the possibility that he might resign from the Justice Department "if a special prosecutor were set up and his independence were interfered with."

"My position is untenable unless these investigations and prosecutions are handled correctly," he said.

Elliot L. Richardson chose to resign as Attorney General a week ago rather than dismiss Mr. Cox for his refusal to obey an order by Mr. Nixon not to pursue in the courts his quest for the nine White House tapes.

To do so, Mr. Richardson said, would have violated his pledge to the Senate when he was confirmed as Attorney General last May that the special prosecutor would have full authority to challenge in court claims of executive privilege by the President.

William D. Ruckelshaus, Mr. Richardson's former deputy, was discharged by the President a short time later for also refusing to dismiss Mr. Cox.

Mr. Bork, who as Solicitor General was next in command, agreed to carry out the order. He has said he had planned to resign immediately afterward but was persuaded by Mr. Richardson to stay on "because the department needed continuity."

Morale Problem

If the conflict between the Acting Attorney General and the White House over the special prosecutor's role eventually lead to Mr. Bork's resignation, the effect on a Justice Department shaken by the loss of its top officials would do still further damage to morale and efficiency.

Mr. Bork was reportedly consulting with top White House aides over the weekend on possible nominees for special prosecutor and on the guarantees to be provided to him in seeking Presidential materials, but it could not be learned whether any resolution had been reached.

Mr. Bork also expressed the hope that he "would be able to prevent" the appointment of a person who he did not believe was suited for the job, and he implied that he would resign if he were overruled.

"These prosecutions have to

be carried on correctly, and if I thought they were not going to be because of the person chosen, I couldn't tolerate that," he said before the President's announcement at his news conference last Friday night.

He also said he had suggested "five or six names" to the White House who met his prerequisites for the job — previous experience as a prosecutor, something Mr. Cox did not have, and someone who is not now with the Government.

Not Petersen

Mr. Bork declined to name his choices, but they reportedly do not include Mr. Richardson, Mr. Ruckelshaus or Henry E. Petersen, the Assistant Attorney General who has temporarily taken control of the department's Watergate case. One or two, he said, are Democrats, and none of them is from Yale.

General Haig, the White House chief of staff and one of the officials with whom Mr. Bork is believed to be consulting over the appointment, said today that he did not believe a new prosecutor "will have to make a pledge of any kind" not to seek additional White House tapes or other confidential documents.

"Nor do I think he should," General Haig continued, "and if he were the type that would feel encumbered in that way, he's perhaps not the man that we would want."

Mr. Nixon agreed last Monday to surrender the nine original recordings of conversations between him and his aides to the United States District Court here. His decision came two days after Mr. Cox was discharged for refusing to acquiesce in the President's order barring him from seeking the tapes through the courts.

The former special prosecutor and Harvard law professor conceded today that his subpoena for the nine recordings had been "only the first step in seeking a great deal of important evidence from the White House."

Would Have Checked Gifts

Had he remained in office, Mr. Cox said, he would have also challenged the President's assertion of executive privilege in refusing to release certain information concerning campaign contributions from big dairy industry cooperatives that critics have linked to a 1971 increase in milk-price supports.

Mr. Cox emphasized, on the National Broadcasting Company's "Meet the Press" television program, that he had no hard evidence that the White House was concerned about some of the aspects of his investigation.

"But," he added, "I gathered the impression from the Attorney General that he was occasionally subject to calls" from the White House over the scope of the Cox inquiry.

In its issue on sale tomorrow, Time magazine reports that Mr. Cox was dismissed after the White House challenged his determination to pursue four sensitive avenues of investigation, including a program of "national security" wiretaps on Government officials and newsmen.

The three other areas objected to, according to the report, involved a 1970 operation that raised \$4-million for Congressional and gubernatorial candidates, the handling of anti-Nixon demonstrators during the 1972 Presidential campaign, and the activities of the White House's special investigations unit known as the "plumbers."

Predicts Approval

Senator Birch Bayh, Democrat of Indiana, appearing on the American Broadcasting Company's "Issues and Answers" program, predicted that Congress would approve a resolution introduced last week that would authorize the appointment of a special Watergate prosecutor by the courts.

The measure, which has gained 53 co-sponsors in the Senate, was endorsed yesterday by the American Bar Association in a resolution, passed by

the organization's board of governors, calling on Congress to create an independent "office of special prosecutor."

General Haig said today that although the Nixon Administration welcomed the views of the Bar Association, "no President can run this great republic by being the victim of a viewpoint of a particular advocate of a particular point of view."

"I don't think President Nixon is going to feel encumbered by that recommendation," General Haig said on the Columbia Broadcasting System program "Face the Nation." But he added, "He might not ignore it, either."

Mr. Cox, who as prosecutor had no statutory authority, said today that he would prefer that an independent prosecutor, authorized by Congress, be appointed by the courts rather than the President, even though in either case his autonomy would be guaranteed by law.

Feels Less Certain

However, he conceded that he was less certain about the constitutionality of a Congressionally authorized prosecutor who was appointed by the court.

"I feel no hesitance in saying that a bill that created an independent prosecutor, truly independent, and gave him enough power to do the job in a broad enough area, would be constitutional if it allowed for appointment with the advice and consent of the Senate," Mr. Cox said.

On Friday, Mr. Bork expressed strong reservations

about the effort in Congress to set up a prosecutor ultimately answerable to anyone except the President, on the ground that criminal prosecution ought to be a function of the executive branch.

"You don't want to set in motion a train of events in which we wind up with every branch of government with its own Department of Justice, and we conduct relations between the three branches of government by litigation," he said.

Asked what he might do if Congress proved to be successful in its efforts to establish an independent prosecutor, he replied that "some day I would write a stinging article in The Yale Law Journal about the inadvisability of that course of action."

But Mr. Cox suggested that there would be no real problem if Mr. Nixon and Congress both moved to appoint their own special Watergate prosecutor.

"I think Congress could easily legislate the Presidential appointed one out of existence, that would surely be constitutional," he said.

Asked whether he might succumb to sentiment in Congress to take back his old job if it were re-established by law, Mr. Cox, who was packing today to leave for an extended vacation in Maine, conceded that "I suppose if I were pressed that I would have to consider it."

But he added, "It would be unwise for anyone to offer it to me, and unwise for me to take it."

Nixon Plan on Prosecutor Is Opposed by Mansfield

Senator Wants Watergate Aide Named
—by Courts—Ford Believes President
—Regrets His Attack on News Media

Special to The New York Times

WASHINGTON, Oct. 27 — President Nixon's position that the new special Watergate prosecutor will be named by the Administration rather than the courts drew continued opposition today from Democrats in Congress.

"No soap" was the comment that Senator Mike Mansfield, the Senate majority leader, made about the President's announcement last night at his news conference.

In another development stemming from the news conference, Representative Gerald R. Ford, the Vice President-designate, said that he believed that Mr. Nixon, "on second thought, probably wished he hadn't" made such a vigorous attack on the news media. The President had characterized some recent news reports as "outrageous, vicious, distorted." [Details on Page 47.]

And in Chicago, the American Bar Association declared that it could not accept an appointment of a prosecutor by Mr. Nixon and called on Congress to create an independent "Office of Special Prosecutor."

The continuing controversy over the successor to Archibald Cox as special prosecutor came as public opinion polls reported that Mr. Nixon's popularity rating had fallen below 30 per cent for the first time.

Mr. Nixon said last night that Acting Attorney General Robert H. Bork would name a new prosecutor next week, and that the appointee would have independence and the Administration's cooperation.

Mr. Mansfield, a Montana

Democrat, said, however, that he would support a bill that calls for a court-appointed special prosecutor to guarantee the prosecutor's independence. The bill has 53 co-sponsors, Democrats and Republicans.

Senator Mansfield said, "It has to be a special prosecutor who had the same kind of authority that Archibald Cox had."

Representative Thomas P. O'Neill, the House Democratic leader, said in a statement that he did not believe that the new prosecutor "will be acceptable to the Congress and the American public under the terms the President outlined."

After six days of national turmoil that followed the dismissal of Mr. Cox, Mr. Nixon agreed last night to appoint a special prosecutor through the Justice Department.

Independence was clearly the key issue. Attorney General Elliot L. Richardson resigned and his deputy, William D. Ruckelshaus, was dismissed because the independence of Mr. Cox to pursue the Watergate inquiry wherever it led had been curtailed by the President.

Mr. Cox had sought to obtain Presidential tape recordings and documents that the White House refused to yield, asserting that they were confidential. Mr. Cox went to court. The President lost in United States District Court and in the Court of Appeals. He then tried to force a compromise on Mr. Cox. When Mr. Cox refused to accept it, Mr. Nixon dismissed him.

The Acting Attorney General, Mr. Bork, has indicated that he, too, will resign if the new special prosecutor is not given

independence of action.

The adverse reaction of Mr. Mansfield and Mr. O'Neill fol-

lowed similar comments by other Democrats immediately after Mr. Nixon's news conference. But some comments were favorable to the President.

Mr. Ford, the House minority leader whom Mr. Nixon has nominated for Vice President to replace the resigned Spiro T. Agnew, described the President's proposal for a new prosecutor as a fair compromise.

"My understanding is that responsible guidelines would be established for the prosecutor to keep him from irrelevant areas," Mr. Ford said in an interview.

He said that he felt the President was bending over backward to be cooperative, and that the special prosecutor proposed by the President would be "adequate for the present circumstances."

The data indicating further slippage in Mr. Nixon's popularity came from the latest Gallup Poll, taken Oct. 19-22. The Gallup organization said that the data had not yet been fully analyzed, but that so far they indicated an approval rating of 29 per cent for the President.

It said that the final figure could be as low as 28 per cent or as high as 30 per cent, which

was Mr. Nixon's rating in the last previous national poll, taken Oct. 5-8.

1,500 People Questioned

In the latest poll, about 1,500 people were asked the following question in personal interviews: "Do you approve or disapprove of the way Nixon is handling his job as President?" The polling was done in the period in which Mr. Nixon dismissed Mr. Cox and Mr. Richardson resigned but before the President announced his decision to turn the tapes over to the Federal court.

As recently as mid-June, Mr. Nixon had an approval rating of 45 per cent, with 45 per cent voicing disapproval and 10 per cent having no opinion.

Those questioned in the poll were also asked: "Do you think President Nixon should be impeached and compelled to leave the Presidency or not?" Thirty-one per cent answered yes, 53 per cent no and 14 per cent had no opinion.

A poll on the same point in Aug. 3-6 showed 28 per cent for impeachment and 61 per cent against. One in June 22-25 showed 19 per cent for impeachment and 69 per cent opposed.

Senate Democrats Ask Independent Special Prosecutor

By Lawrence Meyer
and Martin Weil

Washington Post Staff Writers

The Senate Democratic caucus overwhelmingly approved a resolution last night calling for an independent special prosecutor to continue the investigation and prosecution "of criminal actions arising out of the Watergate affair and all of its related activities."

The resolution, sponsored by Sen. Sam J. Ervin Jr. (D-N.C.), chairman of the Senate select Watergate Committee, was approved following a 2½-hour meeting in which a wide variety of proposals for continuing the Watergate investigation were reportedly discussed.

The Democratic caucus vote came on the eve of the resumption of the Watergate committee's hearings. The committee will open its investigation into campaign financing with testimony from Berl Bernhard, 1972 presidential campaign manager for Sen. Edmund Muskie (D-Maine).

Ervin's resolution was approved after Senate Majority Leader Mike Mansfield (D-Mont.) had opened the discussion by bringing up the future of Ervin's committee in conjunction with President Nixon's action on Oct. 20 ordering the dismissal of Special Watergate Prosecutor Archibald Cox.

"Now," Mansfield said in a statement he released and read to the caucus, "it is no longer possible, in my judgment, to contemplate the shutdown of the Ervin committee. On the contrary, I

would hope and expect that the Senate would consider forthwith the extension of the committee, with a mandate enlarged to include all the matters which were under consideration by the special prosecutor's office in the Justice Department at the time of the summary dismissal of Mr. Archibald Cox."

President... Nixon... announced last Friday night that acting Attorney General Robert H. Bork would appoint a new special prosecutor... who will have "independence" this week.

Mr. Nixon also said, however, that the new special prosecutor would not have access to presidential documents—the issue that ultimately precipitated the firing of Cox. Bork reportedly has insisted that whoever he appoints must have access to whatever evidence he needs to investigate and prosecute in the Watergate affair and "other" matters coming under his jurisdiction and that no procedural restraints should be placed on his actions by the White House.

Mansfield, who received a standing ovation after he spoke, told the caucus that the Ervin committee is presently the only "duly constituted and equipped (body) to continue an independent, impartial inquiry into the Watergate affair. That will remain the case unless and until there is at least designated a new special prosecutor whose powers are as broad and whose integrity

are as great as that which surrounded Archibald Cox."

Mansfield also endorsed legislation introduced by Sen. Birch Bayh (D-Ind.) and sponsored by a majority of the Senate calling for the creation of a special prosecutor by act of Congress, with the prosecutor to be appointed by the courts.

The effect of the Ervin resolution, which directs Mansfield to consult with minority leader Hugh Scott (R-Pa.) "with a view to the creation of the office of an independent prosecutor," is to endorse the concept of Bayh's legislation without taking up—for the moment at least—the question of extending the life and expanding the jurisdiction of the Ervin committee, which is now required to file a report and end its business by February 1974.

Mansfield, who was the prime force behind the creation of the Ervin committee, told a reporter that he favored giving the committee a new, long-term mandate "if we don't get the right kind of a special prosecutor."

Mansfield was described by one knowledgeable Senate source as being "fully in accord" with the resolution that the caucus passed. This source said the resolution, coupled with Mansfield's statement, could be read as a message to President Nixon that he should modify his position on the powers of the special prosecutor. "The problem's not going to go away. I think that's the signal," this source said.

A senator present at the caucus disagreed, however, that the caucus action carried any implied threat to President Nixon but rather was aimed at lining up support for a move to override a veto of a special prosecutor bill passed by Congress. If Mr. Nixon does not go along and sign it, this senator said that Mansfield's suggestion that the Ervin committee be given more time and more authority was not discussed.

Ervin, who was understood to be opposed to extending the life of his committee, said after the caucus that the Senate still had four months to act on extending and expanding the probe if the need arises.

According to reliable sources Mansfield did not tell Ervin about his proposal prior to presenting it to the caucus. The resolution that Ervin finally presented for a vote—the only resolution put up to the caucus on the subject—"just sort of evolved" after 2½ hours of discussion, according to one source. The Ervin resolution was accepted with only a few voices heard voting against it, according to one senator.

During a morning executive session of the committee, the committee authorized Ervin to introduce a bill that would clearly give the United States District Court here jurisdiction to hear a suit by any congressional committee to enforce a subpoena it had issued to anyone, including the President.

The legislation is designed to overcome a ruling by Chief United States District Judge John J. Sirica in the suit brought by the committee seeking to enforce its subpoena of five White House tape recordings relating to the Watergate fair.

Sirica dismissed the suit earlier this month, ruling that he had no jurisdiction over it. Ervin said he hoped that the bill could be passed by the Senate "within 48 hours" without referring it to committee and that the House of Representatives would approve the measure promptly in order to expedite the committee's suit, which is now before the

United States Court of Appeals.

Sen. Howard H. Baker (R-Tenn.) vice chairman of the committee, that the power of a committee to issue a subpoena is an "idle power" if the committee cannot enforce its subpoena in court.

Besides dealing with the issue of the tapes, the legis-

lation also is understood to be adequate to resolve the difficulty the committee is having obtaining President Nixon's bank records from the Key Biscayne bank of Charles G. (Bebe) Rebozo. Mr. Nixon's close friend Rebozo hasn't responded to a subpoena from the committee for the records.

The committee will resume its hearings today with the testimony of Bernhard, former Muskie campaign manager. Bernhard will be followed by Clark MacGregor, former director of the Committee for the Re-election of the President.

Bernhard and MacGregor were described yesterday as "transition witnesses" who will help move the committee from the second phase of its hearings, concerned with so-called campaign "dirty tricks" into the third and final scheduled phase of campaign financing.

The committee announced that it had applied for limited immunity from prosecution for three prospective witnesses — Robert Lilly, Robert Isham and John Meier.

Lilly and Isham are officials of the Associated Milk Producers Inc., a dairy farmers' cooperative that gave more than \$200,000 to President Nixon's re-election campaign prior to the implementation of an increase in government price supports for milk. Meier is a former employee of billionaire recluse Howard Hughes, whose contributions in 1969 and 1970 of \$100,000 to Mr. Nixon through Rebozo are being investigated by the committee.

Following a morning executive session of the committee, Ervin and Baker discussed with reporters the meeting that they had had with President Nixon at the White House on Oct. 19 when he proposed his arrangement to turn over partial transcripts of the tapes to the committee.

Although their remarks were set in a conciliatory context with both senators

expressing hope that the offer from Mr. Nixon would be reinstated, Ervin and Baker both stressed that they had made no agreement to accept the offer on behalf of the committee. "It was a proposal, not a compromise or an agreement," Ervin told reporters.

Ervin said he and Baker told Mr. Nixon that they would recommend to the committee that it accept the offer but that they made it clear that they have no authority to accept the offer for the committee.

Both senators recalled again that they had been called hurriedly to the White House from out-of-town speaking engagements — Ervin in New Orleans and Baker in Chicago — and that they had had no opportunity to consult with their staffs before the meeting.

Although Baker said in response to a question that "I do not feel that we were used by the White House," both senators made it clear that when they met with Mr. Nixon they were not told that a similar offer had been made to Cox and that he had not accepted it.

From a political point of view, that knowledge could have been significant since Mr. Nixon asserted at his press conference last Friday night that "Mr. Cox was the only one" who rejected the proposal.

Ervin said yesterday that "We took the position that we had nothing to do with Mr. Cox's investigation," and that during the White House meeting "we were told that they would contact Mr. Cox to work out a suitable agreement . . . We were never asked to approve any agreement to which Mr. Cox was a party," Ervin said.

Asked if he thought Cox had been correct in refusing to accept less than total access to the tapes and other documents that he was seeking, Ervin responded that the requirements of Cox's investigation and the committee's are different.

APPENDIX J

Statement of Henry E. Petersen
for Submission to the
Senate Committee on the Judiciary
September 22, 1987

My name is Henry E. Petersen. I served in the Criminal Division of the Department of Justice from 1951 to 1974, and as Assistant Attorney General in that Division from 1972 to 1974. I was a participant in certain of the events of late 1973 that have been discussed in connection with the nomination of Robert H. Bork to become Associate Justice of the U.S. Supreme Court. I submit this statement to the Senate Judiciary Committee in the hope that it will assist the Committee in gaining a fuller understanding of those events.

Upon being apprised of the resignations of Attorney General Elliot Richardson and Deputy Attorney General William French Smith and the dismissal of Special Prosecutor Archibald Cox, I returned to Washington, D. C. on October 20, 1973, and was present at the Department of Justice the following day. At that time, then-Acting Attorney General Bork and I discussed our mutual conviction that the Watergate Special Prosecution Force's investigations must proceed without interruption or outside interference. As the Assistant Attorney General in charge of the Criminal Division, I was given oversight responsibility for the Watergate investigations

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by the Acting Attorney General, who was acting pursuant to a presidential directive to return responsibility for the investigations to the Department of Justice. He and I well understood that our personal and professional reputations depended upon the proper conduct of those investigations. In our discussions on October 21, we noted the importance of keeping the Watergate Special Prosecution Force intact. This would necessarily require us to give the attorneys of the Special Prosecution Force our full support in their efforts to obtain relevant evidence.

On the evening of Monday, October 22, Acting Attorney General Bork and I met in the Solicitor General's Office with Deputy Special Prosecutor Henry Ruth and Special Prosecution Force Counsel Philip Lacovara to discuss the status and future of the Watergate investigations. The Acting Attorney General and I conveyed to Messrs. Ruth and Lacovara our desire that they remain in their positions and continue to conduct the investigations as they had previously. Mr. Bork and I assured them that they would have our full support as the investigations went forward and that we would permit no improper interference with those investigations so long as we remained in positions of responsibility. As Mr. Ruth, a person with whom I had enjoyed a professional relationship of trust and confidence, had been Special Prosecutor Cox's Deputy, we looked to him to provide leadership and continuity to the Special Prosecution Force.

On the following day, Acting Attorney General Bork and I met with members of the Special Prosecution Force at their offices and encouraged them similarly to continue their work on the investigations. I later met separately with the leaders of the various task forces assembled by Special Prosecutor Cox and received general reports on the status of their investigations. The task force leaders were asked to continue their work, and each agreed to do so.

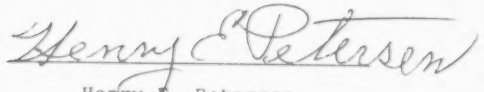
The Watergate investigations proceeded under Mr. Ruth's leadership, with the support of Acting Attorney General Bork and me, and without interference from the White House, until the new Special Prosecutor, Leon Jaworski, assumed office on November 1, 1973. To my knowledge, no request or proposal by Mr. Ruth or any other person on behalf of the Watergate Special Prosecution Force was denied by the Acting Attorney General or by me during this period.

Acting Attorney General Bork's intention to see that the Watergate Special Prosecution Force's investigations continued with full support from the Department of Justice and without any impediment or interference was clear from my earliest contacts with him following the dismissal of Mr. Cox. To my knowledge, he acted at all times in a manner consistent with this intention.

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I would be pleased to respond to any written questions that the Committee may wish to submit to me.

I declare that the foregoing is true and accurate to the best of my knowledge, information and belief.



Henry E. Petersen

APPENDIX K

AFFIDAVIT OF RALPH K. WINTER

Ralph K. Winter, first having been duly sworn, deposes and says:

I am over eighteen years of age and believe in the obligation of an oath. I presently reside at 84 Maplevale Drive, Woodbridge, Connecticut.

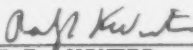
On Friday, October 19, 1973, I traveled with my wife and son to a motel in or near McLean, Virginia. I was scheduled to fly to western Virginia the next day to deliver a speech, while my wife and son were going to spend the day with Mrs. Bork. On the morning of October 20, Mr. Bork told my wife that he intended to go to work for a while and to come home at lunchtime to watch a football game on television. My wife and son then went to the Washington Zoo with Mrs. Bork and one or more of the Bork children. When I returned in the late afternoon or early evening, I went to the Bork home in McLean. Mrs. Bork told me that there was a terrible crisis involving Mr. Bork. Messrs. Richardson and Ruckelshaus had resigned rather than carry out a presidential order to discharge the Watergate special prosecutor, Archibald Cox. Mr. Bork had automatically become Acting Attorney General as a result of the resignations and had agreed to carry out the order.

Sometime thereafter, Mr. Bork returned home. It was clear that he and his wife regarded his carrying out of the presidential order as an act that would inevitably have serious, if not disastrous, consequences for him. Mr. Bork told me that he had complied with the order because he felt, after conversations with Messrs. Richardson and Ruckelshaus, that if he did not carry out the order to discharge Cox, the Department of Justice would be left leaderless. He said that he, unlike Messrs. Richardson and Ruckelshaus, was not under a pledge to the Senate not to discharge the special prosecutor. He said that he did not believe that the President's order was unlawful because the discharge of the special prosecutor alone was not an obstruction of justice. He said that President Nixon had directed him to continue the Watergate investigations and that he, Nixon, wanted a "prosecution, not a persecution," or words to that effect.

Mr. Bork indicated to me that he intended to continue the Watergate investigation. My recollection is that during the evening a television commentator raised the question of whether the special prosecutor's staff would be dismantled and that Mr. Bork had indicated that that was out of the question. He said ~~that~~ in light of the staff's expertise in the matter, it seemed the only appropriate group to continue the investigation.

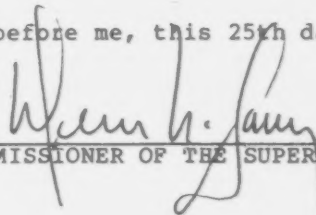
On the evening of October 21, 1973, there was a dinner party at the Bork house that had been planned some time before. Before dinner there was a conversation between Mr. Bork, Mr. William J. Baroody, Sr., and myself. Mr. Baroody asked Mr. Bork what he intended to do with regard to the Watergate investigation. Mr. Bork responded that he intended to continue the investigation through the Watergate special prosecutor's staff. Mr. Baroody indicated that he believed pursuit of the Presidential tapes was a partisan fishing expedition and said to Mr. Bork, "You don't have to go after the tapes," or words to that effect. Mr. Bork replied "I have to, if they are relevant to the criminal investigation," or words to that effect. My recollection is that Mr. Baroody then said something to the effect that the tapes might not be essential, and Mr. Bork indicated that that was a matter to be determined by those carrying out the investigation.

Dated at New Haven, Connecticut, this 25th day of September, 1987.



 RALPH K. WINTER

Subscribed and sworn to, before me, this 25th day of September, 1987.



 COMMISSIONER OF THE SUPERIOR COURT

APPENDIX L

— Justice F. Gordon
Senior United States District Judge
422 Spritts Road, Unit 5
Louisville, Kentucky 40207

August 24, 1987

The Honorable Joseph Biden
United States Senator
Senate Office Building
Washington, D.C. 20510

Re: Judge Robert Bork

Dear Senator Biden:

You may, after reading this communication, have no interest in pursuing the same further; however, I feel duty bound to communicate the facts set forth herein for your consideration.

Perhaps I should first make clear what this letter is not. It is not a complaint against the legal position taken by Judge Bork in the litigation herein-after discussed, for he had the perfect right to take any position in the matter legally he wished. Nor is this letter a complaint arising from Judge Bork's well known conservative legal views, for even I am sometimes referred to in the local media as the "crusty old conservative."

Rather, it is a story of actions taken by Judge Bork which I believe reflect serious flaws in his character. So serious, in my judgment, that they go to his basic honesty.

This is the story. On several occasions between 1972 and 1983, I was designated, pursuant to 28 U.S.C. 294(d), to sit on the United States Court of Appeals for the District of Columbia in order to render assistance to them in a more speedy disposition of their appellate caseload. One such occasion was in the spring of 1982 when I was designated to sit with,

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among others, Judges Roger Robb and Robert Bork, to hear, among other appeals, the important case of Guy Vander Jagt, et al. v. Thomas P. "Tip" O'Neill, Jr., et al., 699 F.2d 1166, cert. denied, 464 U.S. 823 (1983). Copy attached. I believe this was the first appeal Judge Bork heard after his appointment to the federal bench, for I recall that on the morning of March 19, 1982, I found him understandably lost in the hallway and directed him to the robing room of the Court.

After hearing the arguments in the Vander Jagt case, Judges Robb, Bork and I retired to the conference room to voice our individual beliefs as to what the Court's final holding should be. All three of us were in instant agreement that the relief be denied Appellants Vander Jagt. Judge Robb directed our attention to the fact that he had written the prior opinion of the D.C. Circuit in Riegle v. Federal Open Market Committee, 556 F.2d 873 (1981), which he, Judge Robb, considered to be the law of the Circuit. I agreed.

After discussion, it was agreed by all and ordered by Judge Robb that Judge Bork would write the unanimous opinion of the Court, denying relief to the Appellant Vander Jagt on the ground of "remedial discretion," relying on the Riegle case. We then turned our attention to the other appeals heard that morning, their decision and opinion writing assignments thereof.

As we were departing the room at the end of our conference, I recall Judge Bork alluding to the "lack of standing doctrine," to which both Robb and I, particularly Robb, took immediate vigorous exception and reiterated our views that the Riegle case controlled and was the opinion of the majority of the Court. There is no way Judge Bork could have misunderstood Robb's and my position.

August 24, 1987

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Ten days later, I returned to Kentucky and heard nothing further from Judge Bork in the way of his proposed majority opinion in the Vander Jagt case. Months passed, and I began to become concerned lest the Court would not get its order released before the Congress adjourned December 31, 1982 when, though the issue would not become moot, it seemed to me it would be "undercut" in importance and result in somewhat unfair delay toward the Appellants Vander Jagt, who were basing the thrust of their case on the facts existing in the House of Representatives as it was constituted in that session.

Though I was concerned, I took no steps of inquiry, as that was Judge Robb's responsibility as the presiding Judge of our panel. I did not then know that Robb had taken senior status May 31, 1982, and Bork had become the ranking Judge of our panel.

Finally, around the first part of November, 1982, I received a proposed majority opinion from Judge Bork, denying relief to the Appellants on the narrow ground of "no standing." There was no note or cover letter, just the bare bones opinion. I was shocked, to say the least, at the tenor of the opinion; however, my first thought was that perhaps Judge Bork had, since my departure for Kentucky, changed Judge Robb's opinion as to the doctrine of "no standing."

Of course, Judge Bork was freely entitled to his individual judicial opinion as to "no standing" but he was not entitled to make it my opinion or Robb's opinion without our individual consents.

Recognizing that if, in fact, Bork had changed Robb's thinking, I would be required, in truth to my own beliefs, to write a sole concurring opinion denying relief to Appellants Vander Jagt on the ground of "remedial discretion," I concluded to telephone Judge Robb to ascertain the true situation. When I

Sent to Joseph Biden

August 24, 1987

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did so, I discovered Judge Robb to be hospitalized with what I was advised was a serious cancer condition and that he was unavailable for a telephone conversation with me. I then learned, for the first time, that Judge Robb had taken senior status. Immediately, I instructed my law clerk to contact Judge Robb's senior law clerk and instruct him or her in my name to visit Judge Robb if possible, and acquaint Judge Robb generally with Judge Bork's submitted proposed majority opinion and ascertain his (Robb's) reaction thereto.

Several days later I received a call from another Judge of the D.C. Circuit Court of Appeals advising me that Judge Robb was upset by developments in the Vander Jagt case and instructing me, on Judge Robb's behalf, to immediately prepare for the two of us a majority opinion on the basis of "remedial discretion" and to advise Judge Bork to that effect. I was admonished to accomplish this task so that our final order could be issued before the end of the calendar year 1982.

I accomplished this task and the final order was signed by Robb and me on December 23, 1982, and the opinions were issued February 4, 1983, being delayed by the process of preparing a majority opinion and circulating it to Judges Robb and Bork. Judge Bork wrote anew his individual concurring opinion on "no standing" after receiving the majority opinion on "remedial discretion."

In sum, I now recall (a) Judge Bork's actions by way of changing his original position, unknown to Judge Robb and me; (b) Bork's delay in preparing his so-called majority opinion until late in 1982; (c) Bork's failure to dispatch his opinion with some explanatory cover letter; (d) my absence as the junior Judge in Kentucky; (3) Judge Robb's illness from cancer, from which he subsequently died; (f) the

Joseph F. Gordon

August 24, 1987

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creation of a "time of the essence" situation. These considerations give me grave reason to suspect that perhaps Judge Bork intended to have his narrow "no standing" view become the majority opinion of the Court and the law of the Circuit when, in fact, it was the minority opinion.

As a man who has been honored by appointment to and service as a Judge of the United States, I do not believe one who would resort to the actions toward his own colleagues and the majesty of the law as did Judge Bork in this instance, possesses those qualities of character, forthrightness and truthfulness necessary for those who would grace our highest Court.

Senator, you and your Committee may give this such weight as you wish, but I shall be forever convinced that there was a design and plan in Judge Bork's actions and activities. I apologize for the great length of this communication, but I could not conceive of any less lengthy way to give you the entire story for your consideration.

With highest personal respect and with every good wish, I remain,

Sincerely,

James F. Gordon
Senior United States
District Judge

JFG:gel

APPENDIX M

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

OCT 1 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in order to supplement my testimony before the Committee concerning my participation in Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983). I understand that the questions raised by the Committee concerning Vander Jagt arose from an August 24, 1987 letter to the Committee written by Senior District Judge James F. Gordon, a copy of which was provided me last week upon request.

I think the recollections of other persons involved, the contemporary documentation, and the practicalities of the situation all demonstrate that Judge Gordon's present recollection is incorrect. Moreover, I and other judges often discover in the course of preparing an opinion that "it will not write" and change the rationale or even the result. That is precisely what happened in Vander Jagt.

It may help to recount the events in Vander Jagt, as I and others remember them, because our recollection of these events differs significantly from Judge Gordon's. I have attached to this letter all the documents I have located in my files that concern the panel's deliberations in this case, and to which I will refer. As you can see from a review of these documents, I do not believe there is any basis for calling into question my actions in the Vander Jagt case. In addition, my recollection of these events is corroborated by my two law clerks who handled the case from beginning to end, Paul Larkin and John Harrison, and by Judge Robb's personal secretary, Ruth Luff. Ms. Luff's recall of these events was brought to my attention by Senior Judge MacKinnon, who called me after Judge Gordon's letter had been noted in the Washington Post. I have attached to this letter the declarations of Paul Larkin and John Harrison and the affidavit of Ruth Luff.

In Vander Jagt, several Republican Members of the House of Representatives filed suit alleging that House committee assignments by the Democratic majority impermissibly diluted the political influence of the Members and their constituents by assigning fewer seats on committees than their numbers would entitle them to proportionately. The district court dismissed

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the suit on the grounds that the challenge was precluded by the Speech or Debate Clause and the political question doctrine.

On March 19, 1982, I sat on a panel with Circuit Judge Robb and District Judge Gordon, of the Western District of Kentucky, sitting by designation, and heard oral argument on the appeal. At conference following the argument, the panel agreed to affirm the district court, and Judge Robb, who was senior judge on the panel, assigned the writing of the opinion to me. Judge Robb's March 19 memo stated "[t]he opinion will assume that the plaintiffs have standing, but will conclude that they are out of court for numerous other reasons."

In the course of preparing the opinion, I came to the conclusion that the appeal should be decided instead on the ground that the plaintiffs lack standing to sue. I reached this view after a review of the Supreme Court's decision in the Valley Forge case, handed down just months before. Soon thereafter I visited Judge Robb in his chambers and discussed with him my view that the rationale for our decision to affirm the district court should change. Judge Robb agreed with this proposed change, and I returned to my chambers and informed my law clerk assigned to the case, Paul Larkin, of the substance of my discussion with Judge Robb. Both Paul Larkin and Judge Robb's secretary, Ruth Luff, remember this meeting.

On September 17, I sent to Judge Robb and Judge Gordon a draft opinion in the Vander Jagt case; my cover memorandum routinely indicated that I was disseminating the draft "for your review and comment."

(Judge Gordon incorrectly remembers that my draft was not sent to him until "the first part of November," and incorrectly adds that it came without a cover note. This is important, because Judge Robb was hospitalized in November, as Judge Gordon's letter indicates, but he was not hospitalized before then, when these events took place, at the time when Judge Gordon would have had reason to call Judge Robb. As the declaration of John Harrison suggests, what Judge Gordon now remembers as a conversation with another judge concerning this incident may well have concerned other aspects of the case, including perhaps whether Judge Robb would write a separate opinion or join in Judge Gordon's opinion.)

My draft opinion proposed to affirm the district court's dismissal for lack of standing, consistent with my discussion with Judge Robb. One week later I wrote Judge Gordon, apologized for failing expressly to notify him in advance of the change in rationale, and explained my standing rationale; I sent a copy of this letter to Judge Robb on October 1, who may not have received it immediately because he was on vacation in Massachusetts at the

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time. I do not recall who or what prompted the September 24 letter to Judge Gordon.

To my great surprise, I received from Judge Robb in Falmouth, Massachusetts a memorandum to Judge Gordon and me dated October 5, in which Judge Robb expressed surprise at my draft opinion and disagreed with its rationale. Judge Robb wrote that he would apply the holding in the Riegle case, where the court determined a matter of its "equitable discretion" not to disturb the legislative decision. Judge Robb wrote "If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately."

Although in his letter Judge Gordon states that at conference, the Riegle case and the equitable discretion doctrine were discussed, Judge Robb's memorandum the same day of argument does not mention that rationale as a basis for our decision. Moreover, I do not recall any mention of the Riegle rationale by Judge Robb or Judge Gordon at conference or at any time before Judge Robb's October 5 memorandum. My recollection that the Riegle rationale was not considered until Judge Robb's October 5 memorandum is supported by the two memoranda of Judge Robb in my files and my October 8 memorandum, discussed below, to which neither Judge Robb nor Judge Gordon objected. That memorandum shows that at our conference after the argument we agreed to put the case on either the Speech or Debate Clause or the political question doctrine.

I immediately wrote Judge Robb and Judge Gordon on October 8. I explained in full my standing rationale and recounted my earlier visit to Judge Robb's chambers, our discussion of the standing rationale, and Judge Robb's agreement with my proposed change in rationale. I readily acknowledged that "the confusion into which this case has been plunged" was the result of my failure immediately to apprise Judge Gordon of my discussion with Judge Robb when I disseminated my initial draft opinion September 17. I made no excuses; in fact the memorandum contains four separate apologies for this one oversight. I wrote, "Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed." I informed the panel members that I would write a lengthier concurrence, one which would allow me fully to elaborate my thinking on the standing doctrine.

Thereafter, draft opinions by Judge Gordon and me were freely exchanged and comments were made on each other's drafts. I do not recall receiving any criticism from either Judge Robb or Judge Gordon at the time for changing my view of the case or even for failing to inform Judge Gordon right away of this change. Indeed, neither I nor my law clerk at the time, John Harrison,

recalls that the matter was ever brought up after my October 8 memorandum.

In my view, whatever misunderstanding there had been in the early fall of 1982 as a result of my failure to inform Judge Gordon of my change in rationale when I sent him my proposed draft was long ago cleared up to everyone's satisfaction. Upon reading the affidavit of Judge Robb's secretary, I now understand why Judge Gordon could have been upset at the time, because Judge Robb, forgetting our visit, may have told Judge Gordon that he could not have agreed to a change in rationale because I never discussed the matter with him. But I do believe that my memoranda of September 24 and October 8, coming just days after I sent out my draft opinion, fully explained the circumstances to Judge Gordon, and I had no reason to doubt-- in fact, I gave the matter no thought-- that he was satisfied by my explanation until his letter to the Committee nearly five years later.

Judge Gordon's present day recollection of the events in 1982 is all the more surprising after his final letter to me is considered. On December 17, 1982, Judge Gordon sent me his "final draft," and asked that I see to it that his opinion would be processed for publication. Judge Gordon concluded his letter to me with the following: "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide season." This is hardly the sentiment of one who thinks an attempt to dupe him has just been made.

The appeal was decided eventually on February 4, 1983. Judge Robb joined in Judge Gordon's opinion, which affirmed the district court's dismissal on the "equitable discretion" rationale announced in the Riegle case. I wrote a concurring opinion concluding that the plaintiffs lacked standing to sue.

In his letter to the Committee, Judge Gordon states that he was "shocked" to receive my draft opinion. Yet I do not recall that Judge Gordon expressed to me, either at the time, 1982-1983, or at any time since, any displeasure with the panel's deliberative process, or specifically, my involvement in the case. And Judge Gordon does not indicate in his letter that he ever raised this matter with me directly, at the time or at any time since. Indeed, the tone of his December 17, 1982 letter to me is utterly at odds with Judge Gordon's August 24, 1987 letter to the Committee.

After reading for the first time Judge Gordon's letter to the Committee, I can understand why some members of the Committee raised questions. But I cannot help but conclude that, had Judge Gordon consulted the several documents that were sent to him by me and Judge Robb at the time, which I have attached to this

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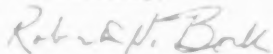
letter, he would not have written the August 24 letter to the Committee.

Apart from this detailed account of my recollection of the panel's deliberations in Vander Jagt, I am compelled to respond to Judge Gordon's accusation that I somehow intended to have my view on standing serve as the holding of the case and become the law of the circuit, without obtaining knowing concurrence of at least one other judge. As I indicated during my testimony, it is simply preposterous to suggest that I could or would have attempted any such thing. The record that is at my disposal, and which I submit to the Committee, in my view refutes any such idea. In particular, the discussion I had with Judge Robb, and the explanatory memoranda I wrote to Judge Robb and Judge Gordon belie this notion.

Of course, the very fact of sending a draft opinion to the other members of the panel, "for their review and comment," as I did in this case, is all that is often done on my court, and frankly, it is all that is or should be necessary. Not infrequently, I have received from other judges on my court draft opinions incorporating changes in rationale from that to which the panel had agreed at conference, and sometimes even a change in the result, without any separate explanation. And every opinion of the D.C. Circuit must circulate among all members of the court for a period of time before it may be issued. There is simply no possibility that any judge could change the law of the circuit surreptitiously. Even if that were possible, as it is not, the full court would simply grant the inevitable petition for rehearing en banc and put the law back in its prior position. Any judge who tried such a maneuver would certainly fail and would, moreover, forfeit forever the respect of his or her colleagues. The facts show that I attempted no such thing.

I hope this letter responds to any questions the Committee has concerning Judge Gordon's letter about the Vander Jagt case.

Sincerely,



Robert H. Bork

Attachments

cc: Honorable Strom Thurmond

March 19, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

M E M O R A N D U M

TO: Judge Robb
Judge Gordon

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v.
Thomas O'Neill, Jr.

DATE: September 17, 1982

Attached is my proposed opinion in the above-mentioned case for your review and comment.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

September 24, 1982

The Honorable James F. Gordon
United States District Court
Western District of Kentucky
P.O. Box 435
Federal Building
Owensboro, Kentucky 42301

Re: No. 81-2150 -- Guy Vander Jagt, et al. v.
Thomas O'Neill, Jr.

Dear Judge Gordon:

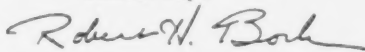
It occurs to me too late that I should have notified you in advance that I had changed the rationale in the Vander Jagt case to one of lack of standing.

After I got started on the opinion, it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. The Supreme Court's opinion in Valley Forge, on the other hand, made it relatively easy to dispose of the case on the standing ground. This tack was also indicated because there are some en banc rehearings coming up in this circuit for which the other two grounds might have implications. That would have complicated the writing of the opinion based upon political question or Speech or Debate.

In any event, I regret not having apprised you of my thinking earlier in the process of writing.

Best wishes.

Sincerely,



Robert H. Bork

RHB/hh

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
FROM: Judge Bork
RE: No. 81-2150 -- Guy Vander Jagt, et al. v.
Thomas O'Neill, Jr.
DATE: October 1, 1982

Attached is the letter I sent to Judge Gordon.

Falmouth, Mass.
October 5, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

My post-conference memorandum in this case said:

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

Now I am surprised to have Judge Bork's proposed opinion, holding that the plaintiffs are out of court because they have no standing to sue. Although I agree with the result I regret that I cannot concur in the opinion. I would apply the Riegle theory to this case. The Valley Forge case, relied on in the proposed opinion, was not a case of a congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the Riegle theory in a congressional plaintiff context.

I think it can be argued here that in many ways plaintiffs have suffered injury. Although the proposed opinion says their votes have not been nullified, it is certainly true that the power or weight of their votes has been substantially diminished. I am not prepared to say that a plaintiff has standing to sue if his injury requires major surgery, but he will not be heard if he has suffered only bruises and contusions.

If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

M E M O R A N D U M

TO: Judge Robb
Judge Gordon

FROM: Judge Bork *RHB*

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 8, 1982

Since my earlier failure to communicate is largely responsible for the confusion into which this case has been plunged, I think it advisable to set out my current thoughts about the case.

1. As explained in my prior memorandum, I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear en banc later this month.

2. Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curiam opinion in Goldwater v. Carter. I understood Judge Robb to agree to this strategy. Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed.

3. Judge Robb suggests that Judge Gordon prepare an opinion affirming the district court on the basis of the circumscribed equitable discretion doctrine elaborated in Riegle. This is yet a fourth ground for affirmance and one not discussed at our conference. I do not object to it for that reason, however. Nor do I have any problem with the idea of turning my opinion into a concurrence.

Page Two

4. I do not agree that the premise of Riegle can any longer be considered intact. The Supreme Court's Valley Forge decision unmistakably demonstrates that separation-of-powers concerns are to be implemented through the concept of standing. Valley Forge, which came after Riegle, is merely the latest in a long line of Supreme Court decisions which make that clear. I do not believe there is any significance in the fact that Valley Forge did not involve a congressional plaintiff. Indeed, separation-of-powers concerns are even stronger when the plaintiff is a congressman.

5. Assuming that Judge Gordon does prepare a majority opinion resting on the doctrine of circumscribed equitable discretion, I will feel free, as I did not when writing for the court, to express my views more fully. I think I should indicate now what those views are and how my concurring opinion is likely to differ from the present draft. I would, as mentioned above, point out that the decision in Valley Forge removes the foundation upon which Riegle rests. I would explain my reasons for thinking that the doctrine of circumscribed equitable discretion incorporates erroneous criteria and permits too many suits by legislators. I would, at a minimum, urge a return to the test of Goldwater v. Carter and would, probably, go on to suggest that Kennedy v. Sampson was wrongly decided and that there should be no such doctrine as legislator standing.

I mention these things now out of what may be an excess of caution bred of my failure to communicate fully earlier in the preparation of my opinion. In no sense do I wish to be understood as in any way displeased that one or both of you cannot agree with what I have written. I welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law.

6. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence. However, I do not think the case will become moot even then.

7. Despite my own failure in the past, I would appreciate learning as soon as Judge Gordon has decided whether the majority opinion is to rest on Riegle so that I can be ready with my concurrence and not delay the issuance of our decision.

I apologize to both of you for not making matters clearer as I went along.

Signature of
James F. Gordon
Judge

United States District Court
FOR THE

Western District of Kentucky

Owensboro, Kentucky 42302

December 17, 1982

The Honorable Robert H. Bork
Judge, U. S. Court of Appeals
District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Washington, D. C. 20001

RE: Vander Jagt v. Speaker O'Neill, No. 31-2150

Dear Judge Bork:

I have not as yet received your most recent re-write in the above-styled matter; however, in the interest of time, I enclose herewith two copies of the final draft of my opinion.

The final draft attached hereto contains some changes on pages 3 and 8 of the opinion and on Footnote pages 9, 10, and 11, plus the further fact I have rewritten the same so that it becomes now only my opinion as opposed to mine and Judge Robb's opinion.

Inasmuch as you are now, in Judge Robb's absence, the presiding Judge, I assume that you will see to the proper processing of my opinion through the Clerk's office there, and that there is nothing further for me to do. I would however appreciate it if you would have your law clerk give us a ring here when you have received this.

May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide Season.

Sincerely,


JAMES F. GORDON

JFG/ddt

Attachment

DECLARATION OF
PAUL J. LARKIN, JR.

I, Paul J. Larkin, Jr., being duly sworn, state:

1. I served as a law clerk to the Honorable Robert H. Bork, Circuit Judge for the United States Court of Appeals for the District of Columbia, from February 12, 1987, through August 13, 1982.

2. The following account is my current recollection of the events concerning the Judge's participation in the Vander Jagt v. O'Neill case, which was heard by Judge Robb, Judge Bork, and Judge Gordon.

3. At the conference following the oral argument in the case, Judge Bork was given the assignment of drafting the opinion for the panel. Judgment was to be entered in favor of the defendants, O'Neill et al. I believe that the panel's tentative rationale was to be that the plaintiff's claim presented a nonjusticiable political question. I remember that the rationale was not to be that the plaintiffs lacked standing.

4. Judge Bork decided to draft the opinion himself, rather than ask me to prepare a draft. After working on the opinion, Judge Bork concluded that the panel should rule instead that the plaintiffs lacked standing to sue. I believe that Judge Bork

- 2 -

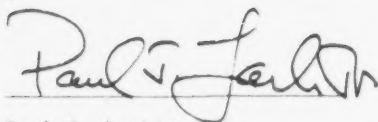
concluded after reading the Supreme Court's January 1982 decision in the Valley Forge case that standing was the appropriate basis for disposing of the Vander Jagt case. Judge Bork told me that he would speak with Judge Robb about his new proposed rationale.

5. Judge Bork spoke with Judge Robb in Judge Robb's chambers about the standing rationale. Judge Bork spoke with me after he returned to chambers. Judge Bork told me that Judge Robb had agreed to dispose of the case on a standing basis, rather than on the rationale to which the panel had originally agreed.

6. I finished my clerkship in late summer. I was surprised when I received a copy of the opinion in the case, because Judge Bork's proposed opinion had become a separate concurrence, rather than the opinion for the court.

7. In my view, there is no foundation to the accusation that Judge Bork's conduct in this case was improper. I find it impossible to believe, and know of no evidence to support the claim, that he sought to take advantage of Judge Robb's illness and to "pull a fast one" on the other members of the panel or on the District of Columbia Circuit.

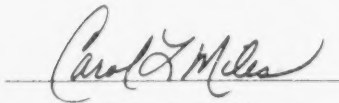
- 3 -



Paul J. Larkin, Jr.

Subscribed and sworn to me this 25th day of September,
1987.

District of Columbia



Notary Public

Carol L. Miles

My Commission Expires August 14, 1989

DECLARATION OF JOHN HARRISON

1. I was a law clerk to Judge Robert Bork, U.S. Circuit Judge for the District of Columbia Circuit, from August of 1982 to August of 1983. During that period I was the clerk primarily responsible for the case of Vander Jagt v. O'Neill, a responsibility I took over from Paul Larkin.

2. My recollection of the events concerning Vander Jagt and their order is not perfect, but I do recall what happened with the case and have several specific recollections.

3. As Judge Bork's files reflect, he circulated his draft panel opinion in the case on September 17, 1982. The cover memo did not mention that the rationale was standing rather than political question or the Speech or Debate Clause. A week later, Judge Bork wrote a letter to Judge Gordon in which he explained the change of rationale and apologized for not having discussed the matter with Judge Gordon earlier. Although I do not remember the specific dates, I do remember circulating the first draft of Vander Jagt and I do remember Judge Bork writing the letter to Judge Gordon.

- 2 -

4. I also remember Judge Bork remarking on (1) his conversation with Judge Robb in which they discussed the new rationale and (2) the fact that Judge Robb later did not remember the conversation. Judge Bork said that another of the judges on the court had spoken of a similar problem with Judge Robb. I think that Judge Bork talked about this after receiving Judge Robb's memo of October 5, but I am not certain.

5. After he decided not to go along with the standing argument, Judge Robb asked Judge Gordon to write an opinion for the two of them based on equitable discretion. That ground of decision is not mentioned in Judge Robb's conference memo of March 19, as Judge Bork noted in his memo of October 8.

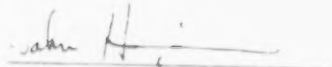
6. I specifically remember Judge Bork drafting the October 8 memo. In particular, I recall his expression of regret about the confusion into which the case had been thrown as a result of his failure properly to communicate with Judge Gordon. Judge Bork seemed quite upset with himself for not having called Judge Gordon at the time he talked to Judge Robb about the change in rationale.

7. Our chambers exchanged drafts with Judge Gordon's so that we could comment on one another's work. I discussed the case at some length with Judge Gordon's clerk and do not remember the change of rationale as a source of any friction between the clerks.

- 3 -

8. On at least one occasion, Judge Robb's wishes in the case were communicated to Judge Bork through Judge Wilkey. My recollection is that Judge Wilkey told Judge Bork that Judge Robb had decided to join Judge Gordon's opinion; earlier, Judge Robb had planned to issue a short statement of his own saying simply that he thought the case should be disposed of under the equitable discretion doctrine.

9. Based on my experience as a law clerk on the D.C. Circuit, the implication that Judge Bork hoped somehow to mislead the other members of the panel by changing his ground of decision without telling them is implausible. A judge could hope to do this only if he believed that no one else would read his draft.



John Harrison

Subscribed and sworn to me this 28th day of
September, 1987.

STATE OF: District of Columbia



My Commission Expires August 14, 1989

Carol L. Miles/Notary Public

AFFIDAVIT OF RUTH LUFF

I, Ruth Luff, being duly sworn on oath, state:

1. I served as personal secretary to Judge Roger Robb, Circuit Judge on the U.S. Court of Appeals for the District of Columbia, from his appointment in 1969 to June 1983 after Judge Robb assumed senior status.

2. The following account is my recollection of the events concerning Judge Robb's involvement in Vander Jagt v. O'Neill, a case heard by Judge Robb, Judge Bork and Judge Gordon in March 1982 and decided by the court of appeals in February 1983 in an opinion by Judge Gordon joined in by Judge Robb.

3. I was contacted several days ago by Tony Fisher, the Clerk of the U.S. Court of Appeals for the District of Columbia, who had been approached by someone from the Senate Judiciary Committee. I was told that the Committee wished to interview me. A staff person from the Committee called me later but did not mention the Vander Jagt case. He asked me about certain people and I told him I no longer maintained close contact with anyone from the court, and probably could not answer any of his questions. I mentioned that I was busy with a new career. At that point he thanked me and the conversation ended.

- 2 -

4. After I read the article in the Washington Post, concerning Judge Gordon and the Vander Jagt case, my memory was refreshed and I recalled the case and many of the circumstances surrounding it.

5. I recall specifically that Judge Bork visited Judge Robb in his chambers on this case after the case was heard, because Judge Robb asked me to locate the file on the case and give it to him. Although I cannot remember precisely when this meeting took place, I believe it was in the spring of 1982.

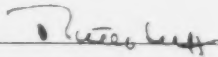
6. I remember that at one point later, perhaps in October 1982, Judge Gordon called Judge Robb, and I got the impression that Judge Gordon was upset by something Judge Bork had written. After Judge Robb ended his conversation with Judge Gordon, he made a critical remark about Judge Bork to me, and said something to the effect of "He never came to see me, and he never let Judge Gordon know." Judge Robb apparently did not recall his meeting with Judge Bork and apparently had told Judge Gordon that. Although I knew that Judge Bork had seen Judge Robb on this case, I did not mention it at the time. I remember Judge Bork's visit to Judge Robb on this case because of the controversy that ensued after this telephone call.

- 3 -

7. It is not surprising that Judge Robb did not recall his meeting with Judge Bork, because Judge Robb was going through a difficult period at this time and shortly thereafter went into the hospital.

8. I do not understand all the attention this case has received. The exchange of draft opinions between judges, sometimes incorporating different rationales than that to which the panel members had initially agreed at conference, is common practice. I do not recall any hard feelings among judges in the past in any case in which this practice occurred.

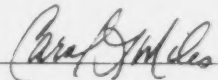
9. I am making this statement because I believe that, based on my memory of the events, the accusations of improper conduct by Judge Bork are unfounded and unfair, and the questions about Judge Bork's integrity caused by this matter deserve to be put to rest.



Ruth Luff

District of Columbia

Subscribed and sworn to me this 25th day of September, 1987.


Notary Public *Carol L. Miles*

My Commission Expires June 14, 1989

APPENDIX N

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in answer to questions from Senator Robert C. Byrd dated October 1, 1987.

I want to thank you for this opportunity to respond to the frustrating inaccuracies and outright distortions concerning my opinion for a unanimous court in Oil, Chemical and Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). Neither then-Judge Scalia nor Senior District Judge Williams nor myself, ever "endorsed" or "approved of" an employer's policy of requiring women to undergo sterilization as a condition of employment. In what can only be described as a heart-wrenching case, we were asked to construe a statute which simply did not cover the company policy before us. As your letter points out, we specifically noted that the company's action might have constituted an "unfair labor practice" under the National Labor Relations Act or a forbidden sex discrimination under Title VII of the Civil Rights Act. See 741 F.2d at 450 n.1. Before I respond to your specific questions, I would like to put the case in its proper factual perspective.

In 1978, American Cyanamid determined that it could not reduce lead levels in the lead pigment department of one of its plants to a level that would be safe for the fetuses of pregnant workers. The Occupational Safety and Health Administration ("OSHA") has taken the position that the Occupational Safety and Health Act (the "Act") requires employers to protect employees from harm to their fetuses, and the Court of Appeals for the District of Columbia Circuit has said that OSHA has authority to impose this requirement. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256 n.96 (D.C. Cir.), cert. denied, 453 U.S. 913 (1981).

- 2 -

Accordingly, the employer adopted a policy that only sterile women (or women past childbearing age) would be employed in this department. The employer informed the women who worked in the department of this policy, and of the availability of surgical sterilization as a way of complying with that policy. Faced with loss of their jobs or with transfer to lower-paying jobs, five of the women elected surgical sterilization in 1978. Subsequently, the women and their union brought a Title VII suit alleging that the sterilization policy constituted sex discrimination, and raising state law claims for intentional infliction of emotional harm and invasion of privacy. A federal district court dismissed the state law claims, as barred by the state statute of limitations, *Christman v. American Cyanamid Co.*, 578 F. Supp. 63 (N.D. W. Va. 1983), and the employer eventually settled the Title VII suit with the women and their union.

The litigation at issue commenced when OSHA issued a citation to the employer seeking a fine of \$10,000 on the grounds that the employer's policy exposed the women to "recognized hazards" in violation of the Act. The Occupational Safety and Health Review Commission ("OSHRC") rejected OSHA's contention that the employer's policy constituted a "hazard" within the meaning of this particular statute. The Secretary of Labor could have petitioned the Court of Appeals for review of the Commission's decision on behalf of OSHA, but the Secretary declined to do so. The appeal was brought instead by the union as an intervenor. The Secretary of Labor did not file a brief.

When the case came before me and my colleagues in 1983, the situation was this: the women had undergone sterilization some five years previously, and there was no prospect that any other women would be subjected to that policy. The sterilized women had obtained a favorable settlement of their Title VII suit. All that was at issue, from a practical standpoint, was whether the employer would have to pay a \$10,000 fine to the federal government. And all that was at issue from a legal standpoint was whether the employer's policy violated the Act -- not whether that policy violated other federal or state law.

Cognizant of the gravity of the harm these women had suffered, my colleagues and I carefully examined every legal and factual point in the case. As to the lead levels in the Cyanamid pigments department, we had before us the finding of an Administrative Law Judge ("ALJ") indicating that it was economically infeasible to reduce the lead content of the air in the plant. For this reason, the ALJ had vacated an earlier OSHA complaint against American Cyanamid based on lead exposure itself.

- 3 -

We also scrutinized the history of OSHA's lead standard for the pigment industry. In 1978, OSHA issued new rules designed to protect workers from exposure to airborne lead in the workplace. The rules were reviewed by the Court of Appeals in a lengthy opinion written by Judge J. Skelly Wright. See United States Steelworkers, 647 F.2d 1189.

For the lead pigment industry, the new OSHA rules required employers to reduce lead levels to 100 micrograms of lead per cubic meter of air within three years, and finally to achieve a level of 50 micrograms per cubic meter of air within five years. Judge Skelly Wright's opinion vacated the new OSHA rules, holding that, "OSHA has not presented substantial evidence for the technological feasibility of the standard for this industry." Id. 1294. Even if lead levels could have been reduced to the lowest proposed OSHA standard, the agency's own medical data indicated that almost one-third of women in the pigment industry would still have ingested enough lead to cause fetal damage. Id. 1250-57. The Supreme Court declined to review Judge Wright's conclusions. See 453 U.S. 913 (1981). After considering these precedents, my colleagues and I concluded that we were dealing with an industry which simply could not be made safe for fertile women.

Faced with the physical impossibility of lowering lead levels, the company had several alternatives. It was clear that the company could not have been charged under the Act if it had closed down the entire department or discharged all thirty female employees. Moreover, the union conceded at oral argument in the case that the company could have lawfully stated that "only sterile women" would be employed in the department. See 741 F.2d at 449-50. In sum, the union's objection boiled down to the fact that the employer "pointed out the option and provided information about it." Id. at 450. Thus, the precise legal issue presented for our review was a narrow one: Did Cyanamid's policy of advising women of the option of sterilization constitute a breach of its duty under the Act to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injury" 29 U.S.C. § 654(a)(1) (1982).

It should be emphasized that we did not confront this issue on a clean slate. The ALJ and the OSHRC, both expert in the area of employment safety law, had found that Cyanamid's policy did not constitute a "recognized hazard" under the Act. During the pre-hearing conference in the case, the ALJ told the parties:

- 4 -

The thing[] that's hit my eye about this whole case, I think we're under the wrong law here. I really do. I don't see where Congress had any thought whatever in passing the OSHA Act in treating the female as opposed to the male segment of the working force.

They were talking about employees across the board. Now, if the Secretary can make out a discrimination case, he's not going to make it out under the OSHA Act. There's a law that covers this, and it's not the Occupational Safety and Health Act.

Now again, it would seem to me that we are operating under the wrong law here. There is the National Labor Relations Act and other labor laws to prevent employers from engaging in unfair labor practices. This is perhaps a matter of collective bargaining.

And your view is that the recognized hazard is a sterilization. And you have got a really difficult burden, Mr. Berger [counsel for the Secretary]. Because I have seen nothing in the law, in the legislative history or of any case decided under section 5A1, that could be convoluted to include sterilization under the situation that we face here as a recognized hazard. No way.

The ALJ subsequently dismissed the claim, and the OSHRC affirmed that decision, stating:

[I]t is clear that Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.

The fetus protection policy is of a different character altogether. It is neither a work process nor a work material, and it manifestly cannot alter the physical integrity of employees while they are engaged in work or work-related activities. An employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social

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factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials. For these reasons we conclude that the policy is not a hazard within the meaning of the general duty clause.

American Cyanamid Co., 9 O.S.H. Cas. (BNA) 1596, 1600 (1981) (footnote omitted).

Our own independent review of the text and legislative history of the OSHA Act confirmed the conclusions reached by the ALJ and the OSHRC. In the Preamble to the Act, Congress refers to "personal injuries and illnesses arising out of work situations" and "safe and healthful working conditions." See 29 U.S.C. §§ 651(a) & (b) (1982). In discussing the very provision at issue in the Cyanamid case, the Senate Report states "[e]mployers have primary control of the work environment and should insure that it is safe and healthful." S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), 10 reprinted in 1970 U.S. Code Cong. & Ad. News 5186 (emphasis added). The Report lists a host of work hazards that the Act was designed to address; all of them involve physical dangers in the workplace itself. See id. at 2-4; 5178-79 (listing such hazards as carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides, etc.). My colleagues and I reviewed this history carefully, and concluded that the OSHRC was correct in not extending the Act to Cyanamid's policy of providing information concerning the option for medical sterilization in a facility unconnected with the company.

As I noted in my opinion, this conclusion was further supported by the Supreme Court's decision in Corning Glass Workers v. Brennan, 417 U.S. 188 (1974). There, in interpreting the phrase "working conditions" in the Equal Pay Act, the Court looked to "the language of industrial relations." Id. at 202. The Court found that the phrase was limited to workplace "surroundings" and "hazards" and did not cover differences between day and night shifts. Id. Both the Fourth and Fifth Circuits had applied the Supreme Court's reasoning in Corning Glass to the OSHA Act, holding that its coverage was limited to physical hazards in the work environment. See Southern Pacific Transportation Co. v. Usery, 539 F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976).

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Thus, the evidence before us overwhelmingly indicated that Congress intended to limit the scope of the Act to "recognized hazards" in the environment of the workplace. As I stated in my opinion, [t]he women involved in this matter were put to a most unhappy choice." 741 F.2d at 450. But to hold that a policy providing such a choice was a work hazard under the Act would have run directly counter to congressional intent, Supreme Court precedent, the considered judgment of two other federal circuits and the specific findings of the ALJ and the OSHRC. We were powerless to aid these women based on the statute upon which the union sued -- we could award neither damages, nor back-pay, nor alternative employment to them. The best we could do was issue a warning to Cyanamid and other employers, that:

The case might be different if American Cyanamid had offered the choice of sterilization in an attempt to pass on to its employees the cost of maintaining a circumambient lead concentration higher than permitted by law.

741 F.2d at 450.

In short, the case presented was very narrow in scope, both as a legal and factual matter. These women had already chosen the sterilization procedure and the plant had already been closed even before I became a member of the appellate court. There was no legal claim in our court seeking to modify or develop alternatives to the company policy by way of injunctive relief or compensatory damages. Neither of the relevant laws dealing with employment policies -- Title VII and the NLRA -- were before us. The only statute at issue was a law that allowed for fines in response to actual safety hazards in the workplace. As the legislative history, administrative agency interpretation and precedent from the Supreme Court and other appellate courts, demonstrated, the OSHA statute simply did not apply to employment policies. Thus, any suggestion that Justice Scalia, Judge Williams or I failed to prevent or failed to remedy the trauma suffered by these women is false, misleading and most unfair. One might just as easily level such a charge against Judge Wright who decided the lead standard case, or the Supreme Court which declined to review his decision.

Having set out that important background, let me turn now to any of your specific questions which I may have left unanswered.

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1. In a footnote to your opinion and in your testimony before the Judiciary Committee, you referred to the fact that the petitioners had brought another case under Title VII of the Civil Rights Act of 1964, which they had settled with the company.

(a) Did the fact that you had been told of this settlement affect your decision in the case before you?

(b) If so, how?

(c) If not, why not?

1. No, the existence and settlement of this particular Title VII suit did not affect my decision. As a judge, my duty is to consider the law and facts before me, not the outcome of prior litigation between the parties. As I stated above, however, since Title VII prohibits employment policies that discriminate as the basis of sex and pregnancy, it more directly governed the situation faced by the women employees than did the OSHA Act. Moreover, if liability were established, backpay and reinstatement would be available under Title VII, to women in a situation like this one. These remedies are not in any way available under the OSHA Act.

2. In your opinion you wrote that "Congress may be presumed to have legislated about industrial relations 'with the language of industrial relations' in mind." Considering your stated philosophy of judicial restraint and deference to the will of the Congress:

(a) Why did you presume that Congress intended to have the plain words of the statute read under the language of industrial relations, rather than that they be given their ordinary meaning?

(b) What research, if any, did you do to determine the actual intent of Congress in its use of the statutory language?

(c) If you did research the actual intent of Congress with respect to its use of the statutory language, what was the result of such research?

2(a). In so doing, I was following a rule well-established by Supreme Court precedent. In the Corning Glass case, cited in my opinion, the Supreme Court stated:

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where Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they are appropriate.' Greenleaf v. Goodrich, 101 U.S., 278, 284 (1880)

While a layman might well assume that time of day worked reflects one aspect of a job's 'working conditions,' the term has a different and much more specific meaning in the language of industrial relations.

417 U.S. at 201-202. This rule is in full conformity with a theory of judicial restraint and deference to Congressional will. Where Congress deliberately uses a well-defined term of art, it would flout Congressional will to give the term dictionary meaning out of its special context.

I believe I have substantially responded to questions (b) and (c) in the body of my letter. As I indicated there, my review of the language and history of the OSHA Act was quite thorough, and uniformly supported the conclusions reached by the ALJ, OSHRC and other courts of appeals.

3. On Friday, September 18, you testified that "the company did not achieve safety at the expense of women." Considering that five women were sterilized and can never have children, please explain why you consider that safety was not achieved "at the expense of women."

3. I think my remarks have been taken somewhat out of context. In no way did I intend to denigrate the suffering of these women. I was referring to the fact that it was not only economically but technologically infeasible for the company to lower lead levels. Thus the company was not passing off safety costs to its employees to save money. As I stated in my opinion, if this had been the situation, we would have had a quite different case.

4. On Friday, September 18, in referring to the five women who were sterilized in order to retain their jobs at the plant, you testified: "I suppose that they were glad to have the choice -- they apparently were -- that the company gave them." Later that same day, the Committee received a telegram from one

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of the women, which read in part: "I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or being fired. Only a judge who knows nothing about women who need to work could say that. I was only 26 years old, but I had to work, so I had no choice."

(a) What evidence led you to assume that the petitioners were apparently glad to have had the choice?

(b) Was information, such as that contained in the telegram, to the effect that the plaintiffs may not have considered themselves as having had a realistic choice, presented to you in the course of the consideration of the case?

4. I obviously was not suggesting that anyone would be glad to choose between continued employment and sterilization. In my opinion I emphasized that the women faced a "distressing" and "most unhappy choice." However, given the technological infeasibility of eliminating the health threat to fetuses, the child-bearing women could not have been safely employed in the pigment plant -- thus creating this distressing situation. I'm quite sure everyone involved was most disturbed about this technological reality and the unhappy choices it engendered.

My statement refers only to the fact that the Company could have, without violating the OSHA Act, closed the plant or fired all the women without consulting with them in any way. In this way, the company alone would have decided the employment future of these women. Although the choice presented was a horrible one, the company did attempt to allow these women some control over their own destiny. While that may not have been the best policy for the company to pursue, the act of enhancing the women's options cannot in and of itself, be viewed as a violation of OSHA.

5. On Saturday, September 19, you testified that "Our court did not endorse the policy of the company." You then quoted extensively from your opinion, discussing the company's policy in detail. If your statements both in the opinion and to the Committee did not constitute an endorsement of the company's policy, do you believe that they constitute a defense of the policy? Please explain.

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5. I have never, in my opinion for the court or before your Committee "endorsed" or "defended" this policy. My duty as a judge was to decide whether or not this policy constituted a "recognized hazard" under the OSHA Act. Given the language and history of that Act I could not in good conscience come to the conclusion that a violation had occurred. I specifically indicated that I thought the policy may have violated two other federal statutes which were not before me. On a personal level, I thought that the company demonstrated serious insensitivity, although perhaps in a misguided effort to allow some women to keep their jobs.

6(a). In hearing the case, did you consider or inquire whether the company could have made efforts other than sterilization to assist the women in maintaining their standard of living, including but not limited to: offering them jobs of equal pay at another plant, offering them retraining for jobs of equal or higher pay, offering them severance pay and assistance in obtaining jobs at similar pay elsewhere, etc.?

(b). If you did not consider or inquire about such other options, please explain why not.

(c). If you did consider or inquire about such other options, did you consider remanding the case? Please explain.

6. Unfortunately, the Supreme Court has made it clear that under the OSHA Act neither a court nor the agency has the power to order severance pay, damages, or any other economic remedy. In American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), the Court struck down a provision of OSHA's cotton dust standard which guaranteed the wages and other employment benefits of employees transferred out of the workplace because of their inability to wear a respirator. Justice Brennan left no doubt about the limitations on the Act, when he wrote:

Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions. Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health, and safety, we conclude that OSHA acted beyond statutory authority when it issued the wage guarantee regulation.

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452 U.S. at 540. Again Senator, our power to help these women was severely limited by the statute under which the union sued. As the ALJ put it, the OSHA Act was simply the "wrong law" for this case.

7. In your opinion, you quoted from 43 Federal Register 54, 422 (1978) that OSHA's lead standard states the agency's belief that "the fetus is at risk from exposure to lead throughout the gestation period." In considering the case, what information, if any, did you have that the exposure to lead could adversely effect the reproductive abilities of both men and women.

7. As I understand it, in its rulemaking process, OSHA heard testimony that lead levels also affected male fertility. See 43 Fed. Reg. 54,388-92 (1978). Although the effects on males were not as firmly documented as those on females, one study suggested that male exposure to high lead levels could have negative effects on sperm potency and male sex drive. This evidence, although highly relevant to a sex discrimination action, was not relevant to defining a "recognized hazard" under the OSHA Act. For this reason, the information did not receive significant discussion in the briefs or oral argument in the case before us.

I believe that both OSHA and the Equal Employment Opportunity Commission ("EEOC") had previously taken the position that the exclusion of females from this type of employment presented sex discrimination issues, not worker safety concerns. Thus, in the context of lead exposure, OSHA referred to this evidence as presenting "equal employment opportunity considerations." See 48 Fed. Reg. 52,960 (1978). In a "Statement on Hazardous Substances and Equal Opportunity" issued in 1978, the EEOC stated:

EEOC will continue the vigorous enforcement of Title VII as to all employment practices or policies that unlawfully exclude women of childbearing capacity and any other person from the workplace or otherwise adversely affect the economic opportunities of any individuals protected by Title VII.

Again the OSHA Act was simply the wrong statute under which to address the possibility of discriminatory exclusion of women from the lead pigment plant.

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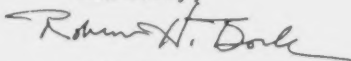
8. Before deciding the case, what information, if any, did you have as to whether:

(a) the Inorganic Pigments Department of the plant, in which the petitioners had been employed, was still in operation;

(b) any of the petitioners were no longer employed at the plant.

8. As best I can recall, the record revealed that the plant was closed in January of 1980 and perforce none of the petitioners were employed there at the time the appeal was heard.

Sincerely,



Robert H. Bork

RHB/cah

cc: Senator Robert C. Byrd
Senator Strom Thurmond

NOTICE: In lieu of a star print, errata are printed to indicate corrections to the original report

100TH CONGRESS }
1st Session }

SENATE

{ EXEC. REPT.
100-7

NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

OCTOBER 13, 1987.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

ERRATA SHEET

This is to correct an error in the executive report of the Senate Committee on the Judiciary, Report 100-7, on the confirmation of Judge Bork to the Supreme Court.

On Page 3, second rollcall vote, Senator Simpson's name appears twice and Senator Specter's name was omitted. The correct version appears below:

The second rollcall vote was on a motion to report the nomination with a negative recommendation. The committee voted, 9 to 5, in favor of the motion.

AYES

Mr. Biden
Mr. Kennedy
Mr. Byrd
Mr. Metzenbaum
Mr. DeConcini
Mr. Leahy
Mr. Heflin
Mr. Simon
Mr. Specter

NAYS

Mr. Thurmond
Mr. Hatch
Mr. Simpson
Mr. Grassley
Mr. Humphrey

